

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**  
10

11 FREDERICK EDSON ALFORD, JR.,

12 *Petitioner,*

13 vs.

14 JAMES M. SCHOMIG, *et al.*,

15 *Respondents.*  
16

2:02-cv-1520-KJD-LRL

ORDER

17 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on  
18 the merits on the claims remaining before the Court.

19 ***Background***

20 As acknowledged in the first amended petition, on December 22, 1991, petitioner  
21 Frederick Alford, Jr. entered his ex-wife's trailer in Las Vegas, Nevada and killed her new  
22 boyfriend, Johnny Richardson, by cutting his throat. Alford initially was convicted in a capital  
23 murder trial of first degree murder with use of a deadly weapon. After the guilty verdict, the  
24 State and Alford entered into a stipulation pursuant to which the State withdrew its intent to  
25 seek the death penalty and the defense agreed to imposition of two consecutive life  
26 sentences without the possibility of parole. Petitioner was sentenced accordingly.<sup>1</sup>  
27

28  

---

<sup>1</sup>See #21, at 1-2; #25, Exhs. 36 & 44.

1 This first conviction was overturned on direct appeal, however, on the ground that the  
2 information provided insufficient notice of the State's intent to pursue a felony murder theory.  
3 Thereafter, Alford was charged by an amended information with first degree murder with use  
4 of a deadly weapon, both on a premeditation theory and a felony murder theory based upon  
5 perpetration of a burglary. During its opening statement at petitioner's second trial, the State  
6 referred to three letters from petitioner to his ex-wife urging her to lie in her testimony about  
7 the status of their relationship and about key facts regarding the killing. Shortly thereafter,  
8 following the State's first witness, petitioner entered an *Alford* plea,<sup>2</sup> on a second amended  
9 information, to a first degree murder charge standing alone without the weapon enhancement,  
10 home invasion and subornation of perjury. A later motion to withdraw the plea was denied.  
11 Alford was sentenced to consecutive sentences of life with the possibility of parole on the first  
12 degree murder charge and two ten year sentences on the remaining charges.<sup>3</sup>

13 Petitioner raises, *inter alia*, a number of claims of ineffective assistance of counsel,  
14 including a claim that trial counsel in the second trial was ineffective for failing to review and  
15 address the letters prior to the trial. The background for this claim and the other claims in the  
16 petition begins at the first trial.

17 Ann Alford, petitioner's former wife, testified at the first trial as a witness for the State.  
18 She testified as follows.<sup>4</sup>

19 She and petitioner were married on December 30, 1988. They had lived together,  
20 however, for approximately three years before that time; and they had two children together  
21 prior to the marriage. #23, Ex. 31, at 146 & 210.

---

22  
23 <sup>2</sup>See *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)(holding that a  
24 defendant can enter a valid guilty plea while still maintaining his innocence where there is a factual basis for  
the plea and the plea is voluntary, knowing, and intelligent).

25 <sup>3</sup>##25-27; Exhs. 51, 63, 80, 82, 83 (at 23-26), 94 & 99 (at 11 & 21).

26 <sup>4</sup>The Court makes no credibility findings or other factual findings regarding the truth or falsity of the  
27 testimony or other evidence presented, and it summarizes the evidence solely as background to the issues  
28 presented. Further, the Court does not summarize all of the evidence presented. The Court instead  
summarizes evidence pertinent to or providing background to the issues in this matter.

1 Both before and after the marriage, however, the relationship was a rocky one. Ann  
2 Alford testified initially on cross that there had been “[p]robably two” separations prior to the  
3 marriage. She further testified, however, that “[i]t was on and off all the time;” and she  
4 acknowledged that there had been several separations “if you want to count every single one,  
5 [as] there’s been numerous occasions that I’ve had to leave for a night or two nights.” Two  
6 days before the marriage, Frederick Alford threw her clothes out the front door; and two days  
7 later they were married. Ann Alford stated that “it was a roller coaster.”<sup>5</sup>

8 They married in December 1988, three weeks after the birth of their second child. The  
9 relationship continued to be a volatile one following the marriage; and the on again, off again  
10 temporary separations “didn’t stop.” At one point, Ann Alford stayed in Massachusetts with  
11 friends. At another point, she and the children stayed with her parents in Rhode Island for  
12 about a month. Her father then sent for Frederick Alford because her father thought that she  
13 needed someone “to keep her in line;” and she voluntarily returned to Las Vegas with Alford.  
14 At yet another point, Ann Alford took the children and went to stay with relatives in Texas.  
15 Frederick Alford bought a house in Las Vegas while she was in Texas. After about a month,  
16 the two reconciled; and Ann Alford and the children returned and moved into the new house  
17 with petitioner. They lived together there until September 1990.<sup>6</sup>

18 In September 1990, Ann Alford left with the children and did not return to live with  
19 Frederick Alford again thereafter. In October 1990, in connection with the separation, she  
20 obtained a restraining order.<sup>7</sup>

21 Ann Alford acknowledged that there was a point in time where they discussed  
22 reconciling and moving as a family to New York:

23  
24 There was a point – there was a point when he come back  
where we talked about working things out trying to get back

25  
26 <sup>5</sup>#23, Ex. 31, at 212 & 220-21.

27 <sup>6</sup>*Id.*, at 217, 220-23 & 249-51.

28 <sup>7</sup>*Id.*, at 146-47 & 222-24.

1 together. I was struggling – I was struggling with my babies and  
2 he had a way of making things sound like paradise.

3 So, yeah, there was a point for a while where we talked  
4 about going to New York and getting back together as a family,  
5 and he was on his best behavior and was straightening out, and  
6 he was really trying to make it work.

7 Then we got into a fight and he hurt me again, and I knew  
8 he was never gonna change.

9 And I wasn't going to keep getting hurt just so that my  
10 kids could have all the things he had to offer. It wasn't worth it  
11 anymore.

12 #23, Ex. 31, at 224-25.

13 On June 7, 1991, Ann Alford obtained a final divorce decree, with Frederick Alford  
14 having supervised visitation rights to see the children in her presence.<sup>8</sup>

15 Ann Alford testified that after the divorce she saw Frederick Alford when he was  
16 present ostensibly for supervised visitation of the children. He would focus on the children  
17 for a few minutes; but he then would focus on her, pressing her for them to get back  
18 together.<sup>9</sup>

19 At some point in 1991 after the divorce, Ann Alford began working at the Beetle Barn,  
20 a Volkswagen repair shop in northeast Las Vegas; and at or around the same time she  
21 moved into a trailer next to the shop. She tried to keep Frederick Alford from finding out  
22 where she lived, but he followed her home from church.<sup>10</sup>

23 She testified that, over and above their contact for supervised visitation, Frederick  
24 Alford tracked her movements and repeatedly made unwelcome contact following the divorce.  
25 He would call her repeatedly at work and at home, leave multiple messages on her answering  
26 machine, follow her three to four times a week, and show up uninvited and unannounced at  
27 her work and home. At her place of work, other employees would have to ask him to leave

---

28 <sup>8</sup>#23, Ex. 31, at 148.

<sup>9</sup>*Id.*, at 163-65.

<sup>10</sup>*Id.*, at 149-52 & 155.

1 after he became upset. He would show up at her home at all hours, including 2:00 or 3:00  
2 a.m. He would knock on her bedroom window if she was asleep; and if she did not let him  
3 in, he would rant and rave until she did.<sup>11</sup>

4 During the uninvited visits and calls, Frederick Alford would start off acting nice and  
5 then often would become more and more angry. The heated conversation then usually would  
6 lead up to him saying: "If I lose, you lose." Ann Alford was concerned for her safety and that  
7 of the children.<sup>12</sup>

8 Every time that they talked, petitioner wanted for them to get back together. Ann Alford  
9 testified that she had made up her mind to live her life without petitioner, and she testified that  
10 she never stated to Frederick Alford following the divorce that they would remarry. She  
11 repeatedly denied in her testimony making any such statement that they would remarry to  
12 Alford at any time after the divorce. She further testified that they never had sexual relations  
13 after the divorce.<sup>13</sup>

14 Ann Alford acknowledged on cross-examination, however, that they had separated  
15 many times and that they had reconciled every time except the last time. She further  
16 acknowledged that it appeared that Frederick Alford's goal in late 1991 was for the family to  
17 get back together and that it appeared that he believed that this would happen. He  
18 sporadically paid child support, paid additionally for other things, and co-signed the note when  
19 Ann Alford purchased a vehicle. She testified on redirect that they did not reconcile the last  
20 time because of his physical and mental abuse of her.<sup>14</sup>

21 Ann Alford testified that petitioner "spent the night one time for a few days" in or around  
22 October 1991. She testified that he slept on the couch and that they did not have sexual  
23 relations. She testified that she made him leave "[b]ecause we got in a fight and he hurt me  
24

---

25 <sup>11</sup>#23, Ex. 31, at 149-56 & 161.

26 <sup>12</sup>*Id.*, at 150-53, 156, 161-62, 165 & 179-80. See also *id.*, at 203 (further statements).

27 <sup>13</sup>*Id.*, at 162-65, 204 & 225-26.

28 <sup>14</sup>*Id.*, at 148-49, 221, 226-27, 232-33, 249-51 & 253-54.

1 again.” She stated: “I told him he was never going to change, and that I couldn’t stand it  
2 anymore. That I never wanted him to come there again.” He continued to show up uninvited  
3 at the trailer thereafter, however.<sup>15</sup>

4 During this time period, Ann Alford was dating other men. She went to a few church  
5 dances with a man from her church who had worked on her car. She and the children also  
6 went on a trip to Southern California with another man from church and his children. She also  
7 went to singles dances at the church. Frederick Alford knew about these dates and social  
8 activities, and he let her know that he did not like it. But he did not threaten the other men or  
9 otherwise seek to confront them to her knowledge.<sup>16</sup>

10 Johnny Richardson was a mechanic at the Beetle Barn who also had worked on Ann  
11 Alford’s car. About a month before Frederick Alford killed him, Richardson and Ann Alford  
12 began dating.<sup>17</sup>

13 About two weeks before petitioner killed Richardson, Ann Alford brought the children  
14 to see Alford for visitation at his room in a northeast Las Vegas valley hotel. She testified that  
15 she would not allow Alford to come to the trailer anymore for visitation and that they usually  
16 would take the children out to eat or shopping.<sup>18</sup>

17 During this visit, Ann Alford told Frederick Alford that she was seeing Johnny  
18 Richardson. She told him “that we had been seeing a lot of each other and we were good  
19 friends, and that I really cared about him.” Alford became very angry. He stated that he could  
20 not stand the thought of Ann Alford being with anyone else. He started slamming things  
21 around the hotel room, once again stating: “If I lose, you lose.” Frederick Alford became  
22 angry to the point that Ann Alford had to take the children home early without going out for  
23 a meal or shopping. #23, Ex. 31 at 174-75, 178, 182 & 231-32.

---

24  
25 <sup>15</sup>#23, Ex. 31, at 168-71 & 226.

26 <sup>16</sup>*Id.*, at 159-61 & 246-49.

27 <sup>17</sup>*Id.*, at 159-60, 171-73 & 229-31.

28 <sup>18</sup>*Id.*, at 173-74 & 228-29.

1 Also during this same visit, Ann Alford saw that Frederick Alford had a brown-handled  
2 folding pocket knife. Ann Alford asked him about the knife, stating to him that he never had  
3 carried a knife before. He responded that she had all of the kitchen knives and that he  
4 needed "something to cut things with."<sup>19</sup>

5 Ann Alford testified that, thereafter, Frederick Alford "just was always angry" and that  
6 "[i]t seemed like quite often we ended up talking about" Johnny Richardson. There was no  
7 doubt in her mind that Alford knew that she was dating Richardson.<sup>20</sup>

8 On or about Thursday, December 19, 1991, Ann Alford and Frederick Alford went  
9 Christmas shopping with the children.<sup>21</sup>

10 On Saturday evening, December 21, 1991, Ann Alford had a planned date with Johnny  
11 Richardson in which the two of them were going together with her children to the church  
12 Christmas party. Ann Alford testified that she told Frederick Alford that she was going to the  
13 party with Johnny Richardson and that he was very angry with her because she was not going  
14 with him. She stated that he said that "it was his family and he should be there with us."<sup>22</sup>

15 Ann Alford and Richardson went to the Christmas party with her children from  
16 approximately 7:00 to 9:00 or 9:30 p.m. On the way back, they picked up the babysitters, Lisa  
17 Larimer and Michelle Smith. They dropped the babysitters and the children off at the trailer,  
18 and Alford and Richardson then went out bowling by themselves. When they returned to the  
19 trailer at about 1:30 a.m., everyone was asleep or appeared to be asleep. They went back  
20 to Alford's bedroom. They talked for a while, and they had sexual relations. They eventually  
21 fell asleep, with 6:30 a.m. being the last time that Alford recalled seeing.<sup>23</sup>

22 / / / /

---

23  
24 <sup>19</sup>#23, Ex. 31, at 175-76.

25 <sup>20</sup>*Id.*, at 176-78.

26 <sup>21</sup>*Id.*, at 227-28.

27 <sup>22</sup>*Id.*, at 180-81 & 184.

28 <sup>23</sup>*Id.*, at 184-91 & 237-38.

1 At about 7:30 a.m., Ann Alford awoke partially to the sound of the babysitters talking.  
2 A brief second later the bedroom door came crashing down, breaking loose from its top  
3 hinges and falling onto a night stand behind the door. Frederick Alford was standing in the  
4 doorway. Alford did not appear to be surprised or shocked to see her in bed with Johnny  
5 Richardson. He instead looked “very determined” and “very angry.”<sup>24</sup>

6 Frederick Alford said “What the f— is this?” Ann Alford asked him “to please get out  
7 of the room, and I would come out and talk to him.” Frederick Alford responded “What if I  
8 don’t feel like it?” Then, “in an instant he just jumped on the bed and he was on top of”  
9 Richardson, who had been sleeping before Alford crashed in the door.<sup>25</sup>

10 Ann Alford jumped up from the bed, grabbed her robe, and yelled for the babysitters  
11 to call 911. As she was running from the room to talk to 911, she saw Frederick Alford  
12 straddled over Richardson with his hands on his face. The men were struggling. She did not  
13 see a knife in Alford’s hand at that time, and she had not seen a knife in his hand prior to that  
14 when he crashed in the door. She was not specifically looking to see if he had something in  
15 his hand, but she acknowledged that she expected that she would have noticed if he would  
16 have had a knife in his hands.<sup>26</sup>

17 While she was on the phone with the 911 operator, Ann Alford heard the men banging  
18 against the wall and she heard Richardson telling Frederick Alford to calm down, to just calm  
19 down. A short time later, she heard a strange gurgling sound; and she dropped the phone  
20 and ran to the bedroom.<sup>27</sup>

21 In the bedroom, she saw Frederick Alford on top of Richardson, slashing him with a  
22 knife. It was the same knife that she had seen Alford with two weeks before at his hotel room.  
23 She saw Alford slash or stab Richardson “a good three or four times” with the knife. It

---

24 <sup>24</sup>#23, Ex. 31, at 191, 199-200 & 239-40.

25 <sup>25</sup>*Id.*, at 191-92 & 199.

26 <sup>26</sup>*Id.*, at 192-93, 240-41, 254 & 256.

27 <sup>27</sup>*Id.*, at 193-94 & 241-42.



1 appeared from her viewpoint behind Alford that he was striking him in the chest with the knife;  
2 but when Richardson raised up momentarily, she saw “a lot of blood” coming from his neck  
3 area. Frederick Alford acted determined, and Ann Alford had no doubt that he intended to  
4 kill Johnny Richardson.<sup>28</sup>

5 Ann Alford pulled Frederick Alford off of Richardson and tried to help Richardson, but  
6 the “blood was just coming out of him.” Frederick Alford, standing at the foot of the bed, then  
7 said, calmly and without apparent emotion: “It’s over. I did it now, and now I’m going to do  
8 it to myself.” He then sliced his left wrist with the knife.<sup>29</sup>

9 Ann Alford ran back to the phone. She told the operator and dispatcher that  
10 Richardson “was hurt really bad,” was in need of medical attention, and was making a strange  
11 sound. While she was on the phone, Frederick Alford said to her: “Annie, come kill me, come  
12 kill me.” The noise coming from Richardson then stopped and Ann Alford started calling his  
13 name. Frederick Alford then said to her, in a normal tone of voice: “Johnny’s dead, Annie.  
14 I killed him. And now I’m going to kill myself. No, you come do it. You come do it.”<sup>30</sup>

15 Ann Alford stayed on the phone until the police arrived as directed by the 911 operator.  
16 Frederick Alford stated that he loved her, that he did it because he loved her, that “all he  
17 wanted was his family back,” and that “if he can’t have it, then he just wants it to be over.”<sup>31</sup>

18 Ann Alford testified that Frederick Alford had not been invited to her home that  
19 morning. She testified that the front door to the trailer would not lock securely because it had  
20 some new weatherstripping. Someone on the inside would think that it was locked, but it  
21 could be pulled open from the outside even though the doorhandle was locked.<sup>32</sup>

22 / / / /

---

23  
24 <sup>28</sup>#23, Ex. 31, at 194-95, 198-99, 201-02 & 242.

25 <sup>29</sup>*Id.*, at 194-95 & 242-43.

26 <sup>30</sup>*Id.*, at 195-97 & 244-45.

27 <sup>31</sup>*Id.*, at 197, 244 & 252-53.

28 <sup>32</sup>*Id.*, at 200 & 202-03. Additional testimony by Ann Alford regarding later events is summarized *infra*.

1           Officer Gary Casper of the Las Vegas Metropolitan Police Department ("Metro") and  
2 his backup officer were the first police officers to arrive at the scene and enter the trailer. He  
3 arrived at the scene at 8:01 a.m. When he entered the trailer, Ann Alford was in the living  
4 room with the two babysitters. Ann Alford told him that her ex-husband had just stabbed  
5 another man and that he was in the back of the trailer. Officer Casper called out to Frederick  
6 Alford to come out to the living room without the knife so that the waiting paramedics could  
7 look at Richardson. Alford said from the bedroom: "I just killed a man, now I'm going to kill  
8 myself" and then "God forgive me for what I've done."<sup>33</sup>

9           With his weapon drawn, Officer Casper moved down the hall toward the bedroom  
10 followed by his backup. As he approached, he heard a gurgling sound. When he reached  
11 the bedroom doorway, he saw Alford sitting on the end of the bed and Richardson's body  
12 lying toward the head of the bed. At that point, he saw Alford slash his own throat, with a left  
13 to right cut with his right arm, "in a very violent manner" and "a determined look on his face  
14 to kill himself." It appeared that he was using all of his strength to do it. He did not appear  
15 to be intoxicated on drugs but instead "was intent on completing the job that he was doing."  
16 Officer Casper had been demanding that Alford drop the knife, but Alford had not complied.  
17 Casper testified that Alford "acted like I wasn't even there, he was looking straight ahead and  
18 cutting his throat." He saw Alford cut his throat approximately three or four times. Alford then  
19 passed out and the knife fell about three inches from his hand. Officer Casper moved the  
20 knife away from Alford with his nightstick and took control of the weapon. He then allowed  
21 the paramedics in.<sup>34</sup>

22           Metro Officer Nancy Howe was Officer Casper's backup in the trailer. Immediately  
23 after the paramedics were allowed in, she took a statement from Ann Alford, who was in  
24 shock, basically hysterical, and very shaken up. Alford stated "that her ex-husband had  
25 entered the front of the house, kicked the door in and cut her boyfriend." Officer Howe asked  
26

---

27           <sup>33</sup>#23, Ex. 32, at 108-112, 115 & 118-21.

28           <sup>34</sup>*Id.*, at 113-15, 117 & 121-22.

1 Ann Alford whether Frederick Alford had access to the residence and she said “no, he didn’t.”  
 2 Howe examined the bedroom door which “appeared like it had been kicked or knocked open”  
 3 and “was damaged” with the “top . . . hanging off.”<sup>35</sup>

4 Metro identification specialists Michael Perkins and Sheree Norman also observed the  
 5 damaged condition of the bedroom door. Perkins stated that “what had happened at some  
 6 point from probably some force, it had been broken off of the top hinge of what was attaching  
 7 it to the wall, the bottom hinge was still attached a little bit on the door.” He further described  
 8 the condition of the door as follows:

9 The door at the time that I arrived was leaning up against  
 10 the wall, the wall that’s right behind where the door is now [in the  
 11 picture being discussed at trial]. The bottom hinge was still intact  
 12 on the door, was a little bit loose, and the top hinge was broken  
 13 off, and the top of the door was leaning away probably three to  
 14 five inches at the distance at the hinge.

15 Norman similarly observed that “the top hinge on the door was broken and the door was  
 16 hanging.” Another witness for the State, Sherry Rollins, additionally provided corroborating  
 17 testimony regarding how the door was damaged after the attack and had not been in that  
 18 condition previously.<sup>36</sup>

19 As for the front door to the trailer, Perkins testified:

20 . . . the front door, we had a great amount of difficulty  
 21 securing it when we left the residence. You can close the door  
 22 and you think it will be latched and you would pull on the handle  
 23 and the door would pop open without any force.

24 . . . after we had completed our investigation and we were  
 25 preparing to secure the residence, we had a lot of difficulty in  
 26 getting that door to lock. When you would close the door and the  
 27 door would latch, you would hear it latch. You could pull on the  
 28 handle and the door would open right back up without even  
 turning it. You would just pull straight out and it would open.

#23, Ex. 31, at 143; Ex. 32, at 174. Two other State fact witnesses, Rhonda Bower and

---

<sup>35</sup>#23, Ex. 32, at 92-100.

<sup>36</sup>#23, Ex. 31, at 143 (Perkins); Ex. 32, at 163 (Norman) & 172-73 (Perkins); #24, Ex. 33, at 67-68 (Rollins). Additional corroborating testimony from the babysitters is summarized *infra*. Additional testimony from Rollins on other matters also is summarized *infra*.

1 Sherry Rollins, testified that the door had a locking or latching problem prior to the attack.  
 2 Bower responded affirmatively to a question as to whether the apparently locked front door  
 3 could be opened with “a little force.” Rollins also agreed that the locked door could be opened  
 4 before the attack with “some force,” and she elaborated that Frederick Alford could open the  
 5 locked door but that both she and Ann Alford had tried and neither could open the door.<sup>37</sup>

6 The babysitters, Lisa Larimer and Michelle Smith, testified collectively as follows.

7 While they were at the trailer babysitting on the Saturday evening, they did not receive  
 8 any calls from Frederick Alford asking if he could come over the following day. Larimer  
 9 cleaned the bedroom while Ann Alford and Johnny Richardson were out on their date. She  
 10 did not see a knife in the bedroom.<sup>38</sup>

11 At about 7:30 a.m. on the following morning, Frederick Alford came in unannounced.  
 12 He did not knock on the door, and they did not open the door to let him in. He instead opened  
 13 the door and walked into the trailer unannounced. He appeared angry and confused, “[I]ike  
 14 he always looks,” according to Larimer. Alford asked them: “Is Annie home?” and “Is she in  
 15 her room?” One or both responded with a simple “yes” to each question.<sup>39</sup>

16 Alford then started walking back to the bedroom at a faster than normal pace. They  
 17 did not see a knife in his hand. Smith, however, testified that she saw Alford pat his jeans  
 18 jacket pocket as if checking to make sure something was there.<sup>40</sup>

19 Smith testified that Alford “busted down” or “kicked in” the bedroom door first with a  
 20 loud crash. Larimer, however, did not testify to hearing any loud crash. Both testified that  
 21 they then heard Alford say: “What the f---- is this?” Then they heard arguing and the sounds  
 22 of a struggle. Smith testified that Ann Alford stated a number of times “Fred, stop, don’t” while  
 23

---

24 <sup>37</sup>#23, Ex. 32, at 69 (Bower); #24, Ex. 33, at 68, 98-99, 101 & 107 (Rollins). Warren Stephens’  
 25 testimony on the condition of the door prior to the attack appears to have been based entirely on hearsay  
 without any direct personal knowledge prior to the attack. See Ex. 32, at 235-36, 247 & 248-49.

26 <sup>38</sup>#23, Ex. 32, at 5 & 9-10 (Larimer); *id.*, at 33-34 (Smith).

27 <sup>39</sup>*Id.*, at 10-12, 17-18 & 21-23 (Larimer); *id.*, at 35-36 (Smith).

28 <sup>40</sup>*Id.*, at 12 & 23-24 (Larimer); *id.*, at 36-37, 44-46, 51, 53 & 56 (Smith).

1 Frederick Alford kept repeating “What the f— is this?” and “What’s going on?” Smith also  
 2 glanced down the hallway toward the bedroom at one point. She saw Frederick Alford moving  
 3 toward Richardson, who was lying on the bed. She did not see a weapon in his hand at that  
 4 point.<sup>41</sup>

5 When Ann Alford yelled from the bedroom for them to call 911, Larimer already was  
 6 in the process of doing so “[b]ecause [it] sounded like there was a big problem” and “[i]t  
 7 sounded like maybe a police officer might help a little bit.” Larimer testified that, a little while  
 8 after Ann Alford first ran out of the bedroom to talk to the 911 operator, Ann Alford yelled  
 9 “Johnny” to the bedroom and Frederick Alford yelled back “Johnny’s dead.” Smith testified  
 10 that Frederick Alford said repeatedly “it doesn’t matter, he’s already dead.” Larimer, but not  
 11 Smith, testified that she heard Frederick Alford say to Ann Alford “I love you” and words to the  
 12 effect of “It’s my turn.”<sup>42</sup>

13 Myron Judkins testified that he lived nearby and also was at the church Christmas party  
 14 on the evening of December 21, 1991. On his way home that evening, at or shortly after  
 15 11:30 p.m., he saw a blue pickup truck with a man sitting inside parked near the Beetle Barn  
 16 and Ann Alford’s trailer. He identified Frederick Alford’s truck as the vehicle that he saw.<sup>43</sup>

17 After the killing, Metro Officer Howe observed at the crime scene that Richardson’s  
 18 body, which was not clothed, “had one extremely large gash, large and deep . . . across the  
 19 whole front of his neck and then two smaller ones underneath . . . [and] also a large gash  
 20 across his chest and across the inner part of his thigh.”<sup>44</sup>

21 Metro Detective Robert Leonard was assigned that morning to investigate the killing  
 22 of Johnny Richardson. In his years as an investigator, he had investigated 232 murders, of  
 23

---

24 <sup>41</sup>#23, Ex. 32, 12-13 & 23-24 (Larimer); *id.*, at 36-39, 43, 45-47, 49-50 & 51-56 (Smith). Smith did not  
 25 put in her voluntary statement on December 22, 1991, that she heard the loud noise of the door being busted  
 in or kicked in. She was steadfast in her testimony, however, that that is what she heard.

26 <sup>42</sup>*Id.*, at 13-17 (Larimer); *id.*, at 39-43, 46 & 48 (Smith).

27 <sup>43</sup>*Id.*, at 77-91.

28 <sup>44</sup>*Id.*, at 100-02.

1 which 36 involved a knife as the actual cause of death. He testified that, of the wounds that  
2 he observed on Richardson's body at the scene, only a slicing or stabbing wound on the back  
3 side of the left forearm conceivably could have been a defensive wound. The remaining  
4 wounds "were unusual in the simple fact that they were actual cutting wounds specifically  
5 applied, not the normal stab wounds." He stated that "these are actual long slicing type cuts,  
6 and this is what was unusual about this particular case." One of the cutting wounds to the  
7 neck "was to the point where the entire trachea and esophagus were exposed."<sup>45</sup>

8 The coroner's chief medical examiner, Dr. Giles Sheldon Green, M.D., conducted the  
9 autopsy of Johnny Richardson's body. He noted several cutting and one or two stabbing  
10 wounds. There were at least three cutting wounds across the neck; a nine inch long, one inch  
11 deep cutting wound down the left side of the abdomen; and a similar obliquely oriented seven  
12 inch long, one inch deep cutting wound across the right thigh below the groin. There  
13 additionally were several more minor wounds, including a superficial cutting wound across the  
14 left upper arm above the elbow and a small shallow stab wound to the back of the left forearm  
15 below the elbow. Richardson's neck was cut very deeply across a distance of four-and-a-half  
16 inches by a "large major cutting wound." The trachea, or upper part of the airway, was cut  
17 completely in two. The right common carotid artery, a large artery that supplies blood to the  
18 head, "was almost cut in two, not quite, but effectively completely transected." Dr. Giles  
19 opined that Richardson's death was a direct result of a cutting wound to the neck. The  
20 medical examiner was able to recover "very, very little" blood from the body.<sup>46</sup>

21 Dr. Fereydoon Tofigh, M.D., examined and treated Frederick Alford on December 22,  
22 1991 at the University Medical Center trauma center. Alford presented with lacerations to the  
23 neck and a laceration of the left wrist. Further examination of the neck lacerations during  
24 surgery revealed a laceration of the external jugular vein, which was bleeding and was ligated  
25 "because it's not very important." Alford had two additional deep lacerations in the neck. The  
26

---

27 <sup>45</sup>#24, Ex. 33, at 12-22 & 25. See also #23, Ex. 32 (photo of body in relation to premeditation issue).

28 <sup>46</sup>#23, Ex. 32, at 129-30, 134 & 136-49.

1 first was at the level of the thyroid and “was quite deep” and involved one-third of the trachea.  
2 Another “more extensive” laceration was below the hyperthyroid cartilage and that went all  
3 the way through the trachea, almost but not completely transecting it. An ear, nose and throat  
4 surgeon was called in to repair the trachea. Alford’s injuries were not life-threatening with  
5 medical intervention. However, if he had not received medical treatment, it was possible that  
6 he eventually could have bled to death from the laceration of the jugular vein, which was open  
7 completely and possibly may not have stopped bleeding on its own.<sup>47</sup>

8 After the police released the crime scene, Sherry Rollins and Warren and Nancy  
9 Stephens, who were friends of Ann Alford, went to the trailer to start cleaning up. They found  
10 messages from Frederick Alford from the previous day and night on Ann Alford’s telephone  
11 answering machine. According to the testimony of Sherry Rollins, Warren Stephens and Ann  
12 Alford, Frederick Alford left up to as many as ten messages in succession, one after the other.  
13 The messages would begin with a pleasant tone of voice, but after no one answered the  
14 message became more angry and laced with expletives. The messages, *inter alia*, repeated  
15 the prior refrain of “If I lose, you lose.” In one of the final messages, Alford said that “if you  
16 don’t pick up the f—ing phone, you’re history.” They did not provide the answering machine  
17 tape to the police, however; and the tape ultimately either was lost or recorded over.<sup>48</sup>

18 Ann Alford additionally testified – at the first trial – about efforts by Frederick Alford to  
19 get her to lie about their relationship and about key facts concerning the killing:

20 Q Now, have you heard from the defendant since  
21 December the 22d, 1991?

22 A Yes.

23 Q How has he corresponded with you? Was it by the  
24 telephone or through letters?

25 A Both.

---

26 <sup>47</sup>#24, Ex. 33, at 5-12.

27 <sup>48</sup>#23, Ex. 31, at 205-08 (Ann Alford); *id.*, Ex. 32, at 216-19 & 239-43 (Warren Stephens); #24, Ex.  
28 33, at 64-66 & 89-93 (Sherry Rollins).

1 Q Both? Has he ever talked to you about your  
2 testifying here today?  
3 A Yes.  
4 Q What has he said about you being a witness today  
5 in this courtroom?  
6 A Things like he wanted me to say the knife was on  
7 the headboard of the bed. He wanted me to tell  
8 them that we were going to get married and go  
9 back to New York.  
10 Q That you and the defendant were going to get married?  
11 A Yes.  
12 Q Is that true? Had you ever said that to him?  
13 A No.  
14 Q Was the knife on the headboard of the bed?  
15 A No.  
16 Q Did he say anything else with regards to what you  
17 should testify to today or how you should testify?  
18 A He wanted me to tell the jury that I was leading both  
19 him and Johnny on. That he had no reason to  
20 believe that I would be with Johnny because I made  
21 him believe that we were going to get back  
22 together.  
23 Q Did he ever tell you that his life was in your hands?  
24 A Yes.  
25 Q What did he say?  
26 A He said when we were together, I was in control,  
27 and now I guess you're in control and my life is in  
28 your hands, and you're the only one that can help  
me.

Q Did he ask you to tell this jury things that weren't true –  
A Yes.  
– in order to help him?  
A Yes.  
Q Did he ask you to tell the jury that you invited him over that  
day?



1                   A       On that particular one, he never said that it was a  
2                               lie. He just wrote things like, you know, I called that  
3                               morning and, you know, I talked to the baby-sitters.  
                              Stuff like that.

4       #23, Ex. 31, at 203-05. See also *id.*, at 208-09; #24, Ex. 33, at 69-70 (Ann Alford's  
5       statements to Sherry Rollins about the letters and about pressure not to testify). When Ann  
6       Alford was asked a few questions later whether she still was afraid of Frederick Alford, she  
7       responded that "[i]f there's a word beyond fear, it would be that." *Id.*, at 209.

8               The remaining prosecution and defense witnesses were directed primarily to the state  
9       of the relationship between Frederick Alford and Ann Alford at the time that Frederick Alford  
10      killed Johnny Richardson.

11             Another regular babysitter for Ann Alford, Rhonda Bower, testified for the State. She  
12      testified that when Frederick Alford came to the trailer, he would lead Ann Alford by the arm  
13      into another room and they would argue. Frederick Alford otherwise would try to put his arm  
14      around her and she would shift her body away to the side. Ann Alford appeared to be  
15      frightened of him, and she stated to Bower several times that she was. Often when Bower  
16      was there babysitting, Frederick Alford would drive by in his truck multiple times and/or would  
17      call repeatedly. One time his driving by frightened Bower to the point that she called for her  
18      father to come over. She acknowledged on cross-examination that she was babysitting at the  
19      trailer one night when Frederick Alford and Ann Alford were out together. However, she did  
20      not remember exactly when it was and she did not know whether Frederick Alford was still  
21      there when she stopped by the next morning.<sup>49</sup>

22             Warren Stephens testified for the State. Stephens was the owner of the Beetle Barn  
23      and the trailer, and he was a bishop affiliated with the church that Ann Alford had been  
24      attending. Johnny Richardson was his nephew. Stephens testified that when Frederick  
25      Alford was at the trailer Ann Alford "was afraid, standoffish" and "[s]he tried to stay away from  
26      him as much as possible." Ann Alford was afraid of him, and she told Stephens that "she

---

27  
28                   <sup>49</sup>#23, Ex. 32, at 57-77.

1 wanted to be rid of him” and that “[s]he didn’t want to have anything to do with him.” Frederick  
2 Alford behaved in a controlling and demanding manner, and he was angry at times. The last  
3 time that Stephens talked to Frederick Alford, about a week before Alford killed Johnny  
4 Richardson, Alford said to Stephens “that she was his girl and that he was going to get her  
5 back; nobody else was going to get her.” Stephens testified that from his conversations with  
6 Frederick Alford it was evident both that Alford knew that Ann Alford was dating Johnny  
7 Richardson and that Alford did not like it.<sup>50</sup>

8 Sherry Rollins substantially corroborated Ann Alford’s testimony in a number of  
9 respects. According to her testimony, Frederick Alford was domineering and possessive; and  
10 he demanded Ann Alford’s attention. The two broke up and got back together multiple times.  
11 On the occasions when Ann Alford moved out and stayed with Rollins, Frederick Alford would  
12 come beating on her door angrily. Ann Alford later moved into the trailer in an effort to avoid  
13 being found by Frederick Alford, but he found out where she lived by following Rollins.<sup>51</sup>

14 Thereafter, when Frederick Alford came over for child visitation, he would play with the  
15 children for a few minutes and then focus his attention on Ann Alford. She allowed him to  
16 sleep on the couch at the trailer for a few nights when he did not have a place to stay, but she  
17 consistently denied having sex with him after the divorce. Ann Alford told Rollins that she  
18 wanted to marry Johnny Richardson; she never said that she wanted to remarry Frederick  
19 Alford. Both Ann Alford and Rollins were afraid of Frederick Alford.<sup>52</sup>

20 Sherry Rollins testified to three encounters with Frederick Alford that were of particular  
21 note in the time period leading up to the time that he killed Johnny Richardson.  
22 Approximately two months before the killing, Rollins encountered Frederick Alford waiting  
23 outside Ann Alford’s trailer. Rollins testified that Alford was very angry. He stated to her “that  
24 they were having sex, that they were having a relationship, that they were going to be  
25

---

26 <sup>50</sup>#23, Ex. 32, at 200-01, 205-06, 208, 213-14, 223, 228-30 & 247-48.

27 <sup>51</sup>#24, Ex. 33, at 52-58, 60 & 80-82.

28 <sup>52</sup>*Id.*, at 55, 57, 59-61, 63, 75, 83, 86-87, 97 & 99-100.

1 remarried and he didn't understand why she was dating other men and he was just very upset  
2 because she wasn't there when he came to see her."<sup>53</sup>

3 A month before the killing, Frederick Alford struck a different tone and presented a  
4 different picture of his relationship with Ann Alford, when he purportedly accidentally ran into  
5 Rollins in a grocery store parking lot. Alford was very apologetic for all of the problems that  
6 he had caused, and he stated that they he and Ann Alford really had not been having sex  
7 together. He stated that it would be best if he went to help his father with his business in New  
8 York, and he indicated that he was planning to do so.<sup>54</sup>

9 The weekend before the killing, however, Rollins once again encountered Frederick  
10 Alford parked outside Ann Alford's trailer. Rollins found him there when she went to check  
11 on her children who were babysitting for Ann Alford. This time, Frederick Alford angrily stated:  
12 "She's playing games. She's sleeping with me and now she's going out with them. She is  
13 playing games with me."<sup>55</sup>

14 Rollins' testimony differed from Ann Alford's testimony in that she testified that they told  
15 her together that Frederick Alford paid the down payment for Ann Alford's car, as opposed  
16 to merely cosigning the loan. She additionally testified that she knew of the two shopping with  
17 the children as well as without the children when they were Christmas shopping for toys.<sup>56</sup>

18 Rollins additionally testified on cross-examination that she had been concerned about  
19 Ann Alford leading Frederick Alford on:

20 A I was very concerned about Annie leading him on,  
21 and I would constantly talk to them about it.

22 Q Because I believe, as you and I when we met you  
23 said Annie would kind of lead him on as Fred would  
24 do similar with her. Is that accurate?

---

25 <sup>53</sup>#24, Ex. 33, at 70-71 & 104.

26 <sup>54</sup>*Id.*, at 71-72, 83-84 & 103-04.

27 <sup>55</sup>*Id.*, at 61-62, 84-86, 102-03 & 109-10.

28 <sup>56</sup>*Id.*, at 80-81 & 95-96.

1           A     In the sense that Fred would not always be willing  
2                   to give her money or help with the kids unless  
3                   Annie acted friendly to her [sic], and she felt like  
                  she had to do in order to get the assistance that  
                  they needed. I believe there was limitations.

4           Q     But they would both kind of do things to –

5           A     Annie always told me that she wanted a father for  
6                   her children and so she went to many extremes to  
7                   try and give him a chance so that he could be there  
8                   for the children, and if that meant being a little nice  
                  to him, then she would do that and then when the  
                  situation was where she was uncomfortable, then  
                  she would have to have him leave.

9     #24, Ex. 33, at 100-01. See also *id.*, at 102 & 107-08 (related redirect and recross).

10           The defense relationship witnesses included Frederick Alford's mother and stepfather,  
11     Catherine and Willis Moses, who were from Seneca, New York. They testified collectively that  
12     Frederick Alford and Ann Alford were planning, in September or October 1991 subsequent  
13     to their divorce, to move to New York together, that Ann Alford also had told them this herself,  
14     and that they had obtained brochures from area junior colleges for Ann Alford at her request.  
15     On cross-examination, however, neither had knowledge of an alleged incident involving Ann  
16     Alford and her younger child that allegedly caused her to leave Frederick Alford and put an  
17     end to the New York plans.<sup>57</sup>

18           Joanie and Michael Abraham also testified for the defense. Joanie Abraham had  
19     known Frederick Alford for twelve years, since she was fifteen. The Abrahams testified  
20     collectively that Frederick Alford stayed at their home for a time both before and after the  
21     divorce. Ann Alford and the children often visited Frederick Alford at their home. Ann Alford  
22     frequently would stay overnight there and have sexual relations with Frederick Alford, both  
23     before and after the divorce, while the children were playing or asleep. They also used the  
24     Abraham's house a number of times to "play house" while the Abrahams were away.<sup>58</sup>

25           ///

26  
27           <sup>57</sup>#24, Ex. 33, at 118-31 (Willis Moses); *id.*, at 132-43 (Catherine Moses).

28           <sup>58</sup>#24, Ex. 35, at 10-16 (Michael Abraham); *id.*, at 19-29 (Joanie Abraham).

1 Joanie Abraham further testified that Ann Alford told her after the divorce, “several  
2 months” before December 22, 1991, that they were planning to move to New York to work  
3 things out and become a family again. She acknowledged on cross-examination, however,  
4 that she had “seen something from both sides” in terms of evidence of physical abuse – in  
5 response to questioning from the State as to whether she was aware of an alleged incident  
6 involving Ann Alford and her younger child that allegedly caused her to leave Frederick Alford  
7 and put an end to the New York plans.<sup>59</sup>

8 Joanie Abraham also testified that Ann Alford told her on December 22, 1991, later  
9 on the same day as the killing, that Frederick Alford came over to the trailer that morning  
10 because the two of them had made plans to go out to breakfast.<sup>60</sup>

11 A defense investigator, Arlan Justice, additionally testified that Ann Alford stated to  
12 him:

13 She told me that she had told Fred that she  
14 was seeing someone. She didn’t tell him that it was  
15 serious, nor did she tell him that it was Johnny  
[Richardson].

16 #24, Ex. 33, at 144 & 148.

17 In closing argument at the first trial, the State relied upon Frederick Alford’s attempts  
18 to get Ann Alford to lie:

19 He asked Annie to say that the knife was  
20 already in the bedroom on the headboard so that I  
21 didn’t come in there with the knife. Make it look  
good for me. Also say that you invited me over.  
That will help, too.

22 Now, if the defendant had killed Johnny  
23 Richardson in the heat of passion as [defense  
24 counsel] would have you believe, why is he asking  
Ann Alford to lie for him? This is consciousness of  
guilt, ladies and gentlemen.

25 Ex. 24, Ex. 35, at 157-58.

---

27 <sup>59</sup>#24, Ex. 33, at 37-41; see also *id.*, at 18-19 (Michael Abraham).

28 <sup>60</sup>*Id.*, at 34-37.

1 After hearing the evidence at the first trial, the jury returned a verdict of guilty of first  
 2 degree murder with use of a deadly weapon. The State and the defense stipulated to the  
 3 imposition of two consecutive life sentences without possibility of parole, and the matter thus  
 4 was not presented to the jury in a penalty phase hearing for consideration of possible  
 5 imposition of the death penalty.<sup>61</sup>

6 The conviction was overturned on direct appeal, however, on the ground that the  
 7 information provided insufficient notice of the State's intent to pursue a felony murder theory.  
 8 *Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995).

9 On remand for retrial, Alford initially decided to represent himself. Ultimately, however,  
 10 new defense counsel from the state public defender's office, Peter LaPorta, was appointed  
 11 to represent petitioner to replace counsel from the county public defender. Nancy Lemcke  
 12 later joined LaPorta as second chair defense counsel.<sup>62</sup>

13 The State's opening statement at the second trial included the following:

14 Now, December 22nd, 1991, was not the last time Ann  
 15 Alford had contact with the defendant. The evidence will show  
 16 that Ann Alford's nightmare would continue. The defendant  
 17 constantly called her, wrote her letters, told her how to lie in court,  
 18 how to lie to fool the DA, to fool the jury, how to lie to get him out  
 19 of this hole that he's in. How to prove to you that it wasn't  
 20 premeditated. "You got to lie," and those are in letters written by  
 21 this defendant telling his wife or his ex-wife to perjure herself.

22 "Tell them that the knife was already there because, if they  
 23 believe I came in with that knife, it's premeditated murder, and we  
 24 don't want that. And if the DA asks you a question that's going to  
 25 make me look bad, say, 'I don't remember, I forgot. . . . It's been  
 26 a while.' So they'll believe that. You need to say we were getting  
 27 remarried. That is what I thought, but what you intended. If not,  
 28 then kiss my ass good-bye." – and I apologize for the language,  
 but that's directly out of a letter from the defendant.

"Most important, if you have to lie through your teeth, tell  
 how our relationship was just as good as always. You need to  
 say we were having sex just the same as always. Tell them I was  
 coming over there, and I expected to have sex that morning. You

---

<sup>61</sup>#25, Exhs. 36 & 44.

<sup>62</sup>See #25, Exhs. 59 & 60.

1 need to convince them, the jury, that we were a couple, and that  
2 you gave me no reason to expect what happened or what I was  
3 to find there. No matter how much it hurts you, you need to  
4 convince the jury that you were the cause of this happening. You  
5 need to say that you misled both me and Johnny. You need to  
6 make yourself out to be a slut, if that's what it takes, and that's  
7 what it's going to take. I'll make sure the people who really count  
8 know the difference. I promise. Not only that, but if my family  
9 knows that you've done everything you could to help me, you'll  
10 have them for life. On the other hand, if you refuse to help me by  
11 what you say, I can't be responsible for the consequences."

12 In the letter he states, "Metro cops and DA's and all kinds  
13 of officials lie in court. It's a known fact. Nobody can prove  
14 anything against you as long as you keep to the story. I'll be  
15 honest. The DA will probably threaten you, and if he doesn't like  
16 what you say, and will probably put you on the spot in that witness  
17 seat. Don't worry, keep calm. If you think an answer may harm  
18 me, say, 'I don't remember. I'm not sure.' Try not to look at me  
19 in court. If you don't like what the DA is doing or asking, use your  
20 emotions or ask for a recess. First of all, you can't mention these  
21 things to my attorney because then they will know that I've  
22 communicated with you. So if they ask at trial if you ever talked  
23 to me, say, 'No.' You have to in order to convince the jury I  
24 haven't coerced you. Same with these letters. Now, I've denied  
25 knowing anything about you two, and it has to stay that way.  
26 You've got to say that. If you want to help me, you need to do as  
27 I say. So I went ahead and told my attorneys that the knife was  
28 on the headboard when I entered the trailer. That I had put it  
there before, and you will verify this. It's not premeditated murder  
if they believe the knife was already there, and I didn't bring it in.  
That's very important." I'm quoting. "Don't do the morally right  
thing for Johnny when it's not going to bring him back."

18 This defendant has manipulated Ann Alford from day one  
19 and continues to do so even prior to this trial. He is still sending  
20 her letters, telling her how to testify, how to fool you, how to fool  
21 the Court, how to fool the DA. Ms. Alford turned those letters  
22 over to our office after she received them.

21 Now, he's up against the wall. He's facing life  
22 imprisonment without the possibility of parole, and he'll do  
23 anything and say anything to get out of this jam he's in. The jam  
24 he put himself in. He's encouraging Ann Alford to commit a  
25 felony. He's encouraging her to lie under oath, which is perjury.

24 #26, Ex. 83, at 23-26.

25 After the State's first witness, petitioner entered an *Alford* plea to first degree murder  
26 without the weapon enhancement, home invasion, and subornation of perjury.

27 Any additional factual background pertinent to the individual claims presented is set  
28 forth below in the discussion of the respective claims.



### ***Standard of Review***

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 117 S.Ct. 2059, 2066 n.7(1997). Under this deferential standard of review, a federal court may not grant habeas relief merely on the basis that a state court decision was incorrect or erroneous. *E.g.*, *Clark v. Murphy*, 331 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003). Instead, under 28 U.S.C. § 2254(d), the federal court may grant habeas relief only if the decision: (1) was either contrary to or involved an unreasonable application of clearly established law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

A state court decision is “contrary to” law clearly established by the Supreme Court only if it applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell*, 540 U.S. at 15-16, 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware of its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11. For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

A state district court decision constitutes an “unreasonable application” of clearly established federal law only if it is demonstrated that the state court’s application of Supreme Court precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*, *Mitchell*, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9<sup>th</sup> Cir. 2003).

////



1 To the extent that the state court's factual findings are challenged intrinsically based  
 2 upon evidence in the state court record, the "unreasonable determination of fact" clause of  
 3 Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d  
 4 943, 972 (9<sup>th</sup> Cir. 2004). This clause requires that the federal courts "must be particularly  
 5 deferential" to state court factual determinations. *Id.* The governing standard is not satisfied  
 6 by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973.  
 7 Rather, the AEDPA requires substantially more deference:

8 . . . . [I]n concluding that a state-court finding is unsupported by  
 9 substantial evidence in the state-court record, it is not enough that  
 10 we would reverse in similar circumstances if this were an appeal  
 11 from a district court decision. Rather, we must be convinced that  
 an appellate panel, applying the normal standards of appellate  
 review, could not reasonably conclude that the finding is  
 supported by the record.

12 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9<sup>th</sup> Cir. 2004); *see also Lambert*, 393 F.3d at 972.

13 If the state court factual findings withstand intrinsic review under this deferential  
 14 standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1);  
 15 and they may be overturned based on new evidence offered for the first time in federal court,  
 16 if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

17 The petitioner bears the burden of proving by a preponderance of the evidence that  
 18 he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

### 19 ***Governing Substantive Law***

20 The Supreme Court decisions in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602,  
 21 36 L.Ed.2d 235 (1973), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203  
 22 (1985), sharply curtail the possible grounds available for challenging a conviction entered  
 23 following a guilty plea. As the Court stated in *Tollett*:

24 . . . . [A] guilty plea represents a break in the chain of  
 25 events which has preceded it in the criminal process. When a  
 26 criminal defendant has solemnly admitted in open court that he  
 27 is in fact guilty of the offense with which he is charged, he may  
 28 not thereafter raise independent claims relating to the deprivation  
 of constitutional rights that occurred prior to the entry of the guilty  
 plea. He may only attack the voluntary and intelligent character  
 of the guilty plea by showing that the advice he received from

1                   counsel was not within the [constitutional] standards [established  
2                   for effective assistance of counsel.]

3                   411 U.S. at 267, 93 S.Ct. at 1608. Accordingly, “while claims of prior constitutional  
4                   deprivation may play a part in evaluating the advice rendered by counsel, they are not  
5                   themselves independent grounds for federal collateral relief.” *Id.*

6                   In *Hill*, the Court held that the two-pronged test of *Strickland v. Washington*, 466 U.S.  
7                   668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applies to challenges to guilty pleas based on  
8                   alleged ineffective assistance of counsel. 474 U.S. at 58, 106 S.Ct. at 370. Accordingly, a  
9                   petitioner seeking to set aside a guilty plea due to ineffective assistance of counsel must  
10                  demonstrate: (1) that his counsel’s performance fell below an objective standard of  
11                  reasonableness; and (2) that the defective performance resulted in actual prejudice. 474 U.S.  
12                  at 58-59, 106 S.Ct. at 370.

13                 On the performance prong, the question is not what counsel might have done  
14                 differently but rather is whether counsel’s decisions were reasonable from counsel’s  
15                 perspective at the time. In this regard, the reviewing court starts from a strong presumption  
16                 that counsel’s conduct fell within the wide range of reasonable conduct. *E.g.*, *Beardslee v.*  
17                 *Woodford*, 327 F.3d 799, 807-08 (9<sup>th</sup> Cir. 2003).

18                 On the prejudice prong, as a general matter under *Strickland*, the petitioner must  
19                 demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result  
20                 of the proceeding would have been different. *E.g.*, *Beardslee*, 327 F.3d at 807-08.  
21                 Application of this general principle to the specific context of a guilty plea leads to the  
22                 requirement that the petitioner “must show that there is a reasonable probability that, but for  
23                 counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”  
24                 *Hill*, 474 U.S. at 59, 106 S.Ct. at 370.

25                 Under *Hill*, a challenge to the voluntariness of a guilty plea potentially may be based  
26                 upon a claim of ineffective of assistance of counsel in proceedings prior to the plea. As the  
27                 Court observed:

28                         . . . . For example, where the alleged error of counsel is a  
                              failure to investigate or discover potentially exculpatory evidence,

the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. . . . As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, 466 U.S., at 695, 104 S.Ct., at 2068.

474 U.S. at 59-60, 106 S.Ct. at 370-71. Thus, an attorney's unprofessional error in failing to develop a meritorious defense may serve as a basis for overturning a guilty plea and conviction if, viewed objectively, there is a reasonable probability that, but for the error, the petitioner would not have pled guilty and would have insisted on going to trial.

### ***Discussion***

#### ***Ground 1: Ineffective Assistance of Trial Counsel***

In Ground 1, petitioner alleges that he was denied effective assistance of counsel because his appointed trial counsel: (a) failed to argue in a motion in limine prior to the second trial that the Double Jeopardy Clause barred further prosecution on a felony murder theory based upon a burglary charge; (b) failed to secure a complete psychiatric evaluation prior to trial; (c) failed to reasonably communicate with petitioner and to prepare for trial; (d) failed to timely review and address petitioner's letters to his ex-wife; (e) recommended that he plead to charges of home invasion and subornation of perjury; and (f) failed to present crucial evidence at, to request an evidentiary hearing on, or call witnesses in support of the motion to withdraw guilty plea. On claims (a) through (e) above, Alford alleges that he would not have entered the plea that he did or would have gone to trial but for these failures.

#### ***Ground 1(a): Double Jeopardy Challenge to Felony Murder Theory***

In Ground 1(a), petitioner alleges that he was denied effective assistance of trial counsel when counsel failed to argue in a motion in limine prior to the second trial that the Double Jeopardy Clause barred further prosecution on a felony murder theory based upon

1 a burglary charge. Petitioner alleges that reasonably competent counsel would have argued  
 2 that the felony murder/burglary charge in the amended information was barred by double  
 3 jeopardy “because the Nevada Supreme Court had held on direct appeal from Alford’s first  
 4 trial that there was insufficient evidence to support that charge.”<sup>63</sup>

5 On direct appeal following the first trial and conviction, Alford raised no argument that  
 6 the evidence presented at the first trial was insufficient to sustain a conviction to support a  
 7 felony murder/burglary charge. Rather, Alford raised the issue of “whether the district court’s  
 8 instruction to the jury, after the close of the evidence, which permitted them to convict Mr.  
 9 Alford of first degree murder under a theory of which he had no prior notice violated Mr.  
 10 Alford’s right to be informed of the nature and cause of the accusation against him  
 11 guaranteed by the sixth amendment of the United States Constitution.”<sup>64</sup>

12 The Supreme Court of Nevada, in a published opinion, stated its holding on this issue  
 13 in the opening paragraph of the opinion:

14  
 15 In this appeal we hold that a first-degree murder conviction  
 16 based on felony-murder cannot be sustained unless the  
 17 indictment or information puts the defendant on notice of this  
 charge and states facts which support the conclusion that the  
 murder was committed during the commission of an identified  
 felony.

18 *Alford v. State*, 111 Nev. 1409, 1410-11, 906 P.2d 714, 714-15 (1995). The court overruled  
 19 numerous prior decisions to the contrary. 111 Nev. at 1415 n.4, 906 P.2d at 718 n.4.

20 The remainder of the text of the Nevada Supreme Court’s lengthy opinion was devoted  
 21 exclusively to a discussion of the holding that the indictment or information must put the  
 22 defendant on notice that the prosecution would be based upon felony murder. The state high  
 23 court closed its decision with the following disposition of Alford’s appeal:

24  
 25 Because Alford did not receive adequate notice of the  
 charges upon which his conviction was based, we reverse the

---

26  
 27 <sup>63</sup>#21, at 13-14.

28 <sup>64</sup>#25, Ex. 46, at 15; see also *id.*, at 1 & 14-17; Ex. 48, at 2-4.

conviction and remand the matter to the district court for a new trial.

111 Nev. at 1415, 906 P.2d at 717-18.

The portion of the opinion relied upon by petitioner herein is not found in the text of the opinion but instead is found in a footnote following a reference in the text to the “supposed burglary of the trailer home.” The footnote reads as follows:

There is *serious question* here as to whether there is evidence upon which a jury could have found burglary beyond a reasonable doubt. Alford knew the trailer home and had visited it before. He entered the home peaceably and began talking with the babysitters. Whether or not he broke down the bedroom door where his wife was, this *does not look very much like* a burglary case. The State does not specify in the proffered instruction or in its appellate briefs just what felony Alford was supposed to have had in mind when he committed the burglary that supports the murder charge in this case. *Because we rest this opinion on Alford's not receiving fair notice of the charges, we do not elaborate on the point discussed here*, that there is no evidence to support the giving of a burglary/felony-murder instruction.

111 Nev. at 1413 n.3, 906 P.2d at 716 n.3 (emphasis added). The final disposition of the appeal, again, was remand for a new trial.<sup>65</sup>

Before the second trial, defense counsel filed a motion in limine seeking to preclude argument that the murder was committed during a burglary. The motion did not rely upon double jeopardy or an alleged finding by the Supreme Court of Nevada on direct appeal that the evidence was insufficient to support the charge. The motion instead argued that a felony murder charge could not be based upon a burglary charge that was premised upon entry with the intent to commit the felony of murder.<sup>66</sup>

In his *pro se* state post-conviction petition, petitioner claimed:

A major contributor to Petitioner's decision to plead guilty was the failure of counsel to properly [interpret] and understand

---

<sup>65</sup>In a petition for rehearing, the State requested, *inter alia*, that the *dicta* in footnote 3 of the opinion be deleted, and the State provided argument as to how the evidence and law supported a felony murder theory based upon burglary. Alford opposed the petition, stating, *inter alia*, that the last sentence of the footnote was “of no practical consequence” and deletion of the footnote “would leave the central holding of the opinion intact.” The state high court denied rehearing without elaboration. See #25, Exhs. 52, 54 and 56.

<sup>66</sup>#25, Ex. 75; see also Ex. 78, at 9-11.

1 the Nevada Supreme Court's opinion in Alford v. State, 111 Nev.  
2 1409 (1995), when counsel filed and argued the Motion in Limine  
3 to Preclude Felony-Murder Argument, whereas, the Supreme  
4 Court made clear that when the state is seeking a conviction  
5 based on the felony-murder rule, the State must give notice in the  
6 charging document and state specific facts which would support  
7 such a charge. In this case the charging document did not give  
8 specific facts which would support felony murder, and even the  
underlying offense was questionable as recognized by the  
Nevada Supreme Court in Alford, wherein they recognize the fact  
that there is a serious question as to whether there was any  
evidence which would support a conviction for burglary or home  
invasion. Id. at 1415 n.3. Nevertheless, trial counsel did not  
bring this issue up in the motion or argue it any manner  
whatsoever.

9 #27, Ex. 116, at 9; see also *id.*, at 22-24. Petitioner argued therein that trial counsel had  
10 rendered ineffective assistance when he failed "to recognize the complete deficiency of the  
11 Amended Information under the Alford standard," particularly given the statements in footnote  
12 3 of the opinion regarding the strength of the evidence. *Id.*, at 23. At no point did petitioner  
13 allege that trial counsel was ineffective for failing to argue in the motion in limine that the  
14 Double Jeopardy Clause barred further prosecution on a felony murder/burglary charge due  
15 to insufficiency of the evidence at the first trial. *Id.*

16 The state district court, in its decision denying the petition, did not address any claim  
17 of ineffective assistance based upon a failure to assert a double jeopardy bar. The district  
18 court instead addressed the claim that was presented in the petition, and the court held that  
19 the language in the amended information was sufficient to place petitioner on notice that the  
20 State was seeking a felony murder conviction.<sup>67</sup>

21 On appeal from the denial of post-conviction relief, counsel was appointed for  
22 petitioner. Counsel's brief in the Supreme Court of Nevada tracked the *pro se* arguments  
23 made in the district court. Counsel argued that trial counsel had been ineffective for failing  
24 to challenge the adequacy of notice given by the "bald statement" in the amended information  
25 that the crime was committed "during the perpetration or attempted perpetration of a  
26 burglary." Counsel referred to footnote 3 of the opinion on direct appeal only as making

---

27  
28 <sup>67</sup>#27, Ex. 119, at 7, ¶¶ 17-19.

1 “further clear” trial counsel’s “failure to recognize the complete deficiency of the Amended  
2 Information under the Alford standard.” At no point did state post-conviction appellate  
3 counsel assert that trial counsel was ineffective for failing to argue in the motion in limine that  
4 the Double Jeopardy Clause barred further prosecution on a felony murder/burglary charge  
5 due to insufficiency of the evidence at the first trial.<sup>68</sup>

6 The Supreme Court of Nevada listed a claim that trial counsel was ineffective for  
7 “failing to adequately prepare Alford’s motion in limine to preclude a felony murder-argument”  
8 as one of six claims of ineffective assistance of trial counsel. The state high court rejected  
9 the six claims on the basis that “Alford has not demonstrated that the district court’s findings  
10 of fact are not supported by substantial evidence or are clearly wrong.” The court did not  
11 otherwise discuss any of the six claims independently or with greater specificity.<sup>69</sup>

12 In this Court, petitioner maintains that Ground 1(a) is subject to *de novo* review rather  
13 review under the deferential review under the AEDPA standard because the claim was not  
14 addressed on the merits in the state courts, which instead “denied this claim on the ground  
15 that the Amended Information adequately provided notice of the charge.”<sup>70</sup>

16 There is a simple reason, however, why the state courts did not address a claim that  
17 trial counsel was ineffective for failing to argue that the Double Jeopardy Clause barred  
18 further prosecution on a felony murder/burglary charge upon due to insufficiency of the  
19 evidence at the first trial. Petitioner never presented such a claim to the state courts. A side-  
20 by-side comparison of the claim presented by federal habeas counsel with the claim  
21 presented in the state courts leads to the conclusion that Ground 1(a) was not fairly presented  
22 to the state courts and is not exhausted. The claim was not merely ignored; it instead was  
23 never presented. However, respondents nonetheless have not challenged exhaustion of the  
24 claim. The Court exercises its discretion to proceed to the merits of the unexhausted claim,

---

25  
26 <sup>68</sup>#27, Ex. 129, at 21-23.

27 <sup>69</sup>#27, Ex. 132, at 3-4.

28 <sup>70</sup>#53, at 9.



1 given the late stage of these proceedings and the lack of merit of the claim. See *Granberry*  
2 *v. Greer*, 481 U.S. 129, 134-35, 107 S.Ct. 1671, 1675, 95 L.Ed.2d 119 (1987). The Court  
3 will apply a *de novo* standard of review to the claim because the state courts never  
4 considered, or were given the opportunity to consider, the unexhausted claim on the merits.

5 In the final analysis, the moving premise for Ground 1(a) is erroneous. It simply is not  
6 true, as petitioner urges, that “the Nevada Supreme Court had held on direct appeal from  
7 Alford’s first trial that there was insufficient evidence to support that charge.” Instead, the  
8 court only raised a “serious question” in that regard in *dicta*, and the court expressly  
9 eschewed resting its decision on the issue, which was not one of the issues on appeal. The  
10 court further expressly did not elaborate beyond the questions posed in the footnote; and the  
11 court clearly made no holding, on an issue not raised on appeal, that the evidence was  
12 insufficient to sustain a conviction fo felony murder. Petitioner’s selective quotation and  
13 selective emphasis in this matter notwithstanding, the *dicta* in note 3 of the Nevada Supreme  
14 Court’s opinion made no holding that the evidence was insufficient to sustain a conviction  
15 based upon felony murder. The entire moving premise of the double jeopardy argument that  
16 petitioner maintains that trial counsel should have presented therefore is unfounded.

17 Petitioner relies upon *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265  
18 (1988), and *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).  
19 Petitioner relies upon *Lockhart*’s description of *Burks* as holding that, “[b]ecause the Double  
20 Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level  
21 absolute immunity from further prosecution for the same offense, it ought to do the same for  
22 the defendant who obtains an appellate determination that the trial court *should* have entered  
23 a judgment of acquittal.” 488 U.S. at 39, 109 S.Ct. at 290 (emphasis in original).

24 It is readily evident from reading the above quote in context, however, that the *Lockhart*  
25 Court was saying only that a holding on appeal that the evidence is insufficient has the same  
26 effect as an acquittal in the district court:

27 *Burks* was based on the view that an appellate court’s  
28 reversal for insufficiency of the evidence is in effect a  
determination that the government’s case against the defendant



1 was so lacking that the trial court should have entered a judgment  
 2 of acquittal, rather than submitting the case to the jury. *Burks*,  
 3 437 U.S., at 16-17, 98 S.Ct., at 2149-2150. Because the Double  
 4 Jeopardy Clause affords the defendant who obtains a judgment  
 5 of acquittal at the trial level absolute immunity from further  
 6 prosecution for the same offense, it ought to do the same for the  
 7 defendant who obtains an appellate determination that the trial  
 8 court *should* have entered a judgment of acquittal. *Id.*, at 10-11,  
 16, 98 S.Ct., at 2146-2147, 2149. The fact that the determination  
 of entitlement to a judgment of acquittal is made by the appellate  
 court rather than the trial court should not, we thought, affect its  
 double jeopardy consequences; to hold otherwise “would create  
 a purely arbitrary distinction” between defendants based on the  
 hierarchical level at which the determination was made. *Id.*, at  
 11, 98 S.Ct., at 2147.

9 488 U.S. at 29, 109 S.Ct. at 290 (emphasis in original). Absolutely nothing in the discussion  
 10 in either *Lockhart* or *Burks* signifies that a reviewing court’s discussion of the sufficiency of  
 11 the evidence in *dicta*, without reaching a decision on the issue, has the same effect as a  
 12 holding on the issue. There was no reversal for insufficient evidence in the present case.

13 Petitioner cites no apposite authority in any way tending to establish that a double  
 14 jeopardy objection would have had any realistic chance of success in this case if raised by  
 15 trial counsel in the motion in limine. Petitioner accordingly has not established either deficient  
 16 performance by trial counsel in this regard or that, viewed objectively, there is a reasonable  
 17 probability that, but for the claimed error, petitioner would not have pled guilty and would have  
 18 insisted on going to trial. Petitioner accordingly cannot establish a viable claim of ineffective  
 19 assistance of counsel under *Strickland* and *Hill*.

20 Ground 1(a) therefore does not provide a basis for federal habeas relief.

21 ***Ground 1(b): Psychiatric Evaluation***

22 In Ground 1(b), petitioner alleges that he was denied effective assistance of trial  
 23 counsel when counsel failed to secure a complete psychiatric evaluation prior to trial.

24 At the first trial, the defense subpoenaed a psychiatrist, Dr. Jack Jurasky, to testify to  
 25 Alford’s mental state at the time of the killing. On the morning of the last day of the trial, a  
 26 Friday, the defense reported outside the presence of the jury that Dr. Jurasky was unable to  
 27 appear that day because he had a very severe case of the flu. The defense requested that  
 28 the matter be held over, following the completion of the remaining testimony, to the following

Monday so that Dr. Jurasky could testify. The defense reported that Dr. Jurasky had conducted an evaluation of Alford, and the defense made a proffer of his expected testimony from his report. According to the report, Dr. Jurasky opined that Alford's case might be one of pathologic love. Dr. Jurasky noted the former wife's reports of beatings and Alford's own depiction of himself in an interview as being a loving and devoted victim of the wife, who he felt drove him to desperate measures culminating in the killing. He opined that Alford "could have been in the throes of powerful emotions of rage, jealousy, betrayal, et cetera, and will not have been the first, nor the last, to react violently to his wife's infidelity (remember he said they were planning to remarry)." The state district court denied the defense request, and the court excluded the testimony on the basis of relevancy and as going to an ultimate issue of intent reserved to the jury.<sup>71</sup>

On direct appeal after the first trial, petitioner raised the issue of whether the state trial court erred in prohibiting the defense from presenting testimony from the psychiatrist regarding Alford's state of mind.<sup>72</sup>

On this issue, the Supreme Court of Nevada did render a holding in a footnote:

Alford's sole defense, which focused on *mens rea* at the time of the killing, was frustrated by the trial court's refusal to permit the psychiatrist who examined Alford to testify as to Alford's state of mind. The court ruled that the defense could not present the proffered state-of-mind testimony because the defendant's intent was an ultimate issue of fact for the jury to decide. This ruling was, of course, error of major consequence. See, e.g., *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 487, 435 P.2d 498, 508 (1967) (The court recognized that "[t]he clear trend in the law of evidence is [ ] that an expert witness, in his field of expertise may testify to matters which embrace the ultimate issue to be decided by the triers of fact.") NRS 50.295 expressly permits the admission of expert testimony concerning a defendant's intent at the time of committing a homicide. The court's ruling on this point effectually aborted Alford's attempt to defend himself against charges that he had killed his former wife's boyfriend deliberately and in cold blood.

111 Nev. at 1411 n.1, 906 P.2d at 715 n.1.

---

<sup>71</sup>#24, Ex. 35, at 3-9.

<sup>72</sup>#25, Ex. 46, at 1 & 12-14.

1 Prior to the second trial, on June 12, 1996, new defense counsel moved for an order  
 2 approving fees for a psychiatric evaluation by Dr. Franklin Master, a psychiatrist that had  
 3 worked in the past with the state public defender. Counsel's affidavit attested that it was "of  
 4 the utmost importance that counsel have a complete psycho-neurological review of Mr. Alford  
 5 to assist him in presenting an effective defense and mitigation;" that it was "quite possible that  
 6 counsel will call the hired expert psychiatrist to testify on Mr. Alford's behalf during the trial;"  
 7 and that the foregoing was "essential to Mr. Alford's defense." Counsel sought expert fees  
 8 for Dr. Master to conduct "a complete review of any and all discovery sent to Dr. Master,  
 9 including, but not limited to, prior school records, criminal juvenile records, prison record(s)  
 10 and police reports involving the incident" and to "spend a full work day interviewing Mr. Alford."  
 11 The state district court approved the request.<sup>73</sup>

12 At an October 11, 1996, calendar call, the matter was continued, with the state district  
 13 court's approval, one week pursuant to a prior agreement between counsel. The State  
 14 requested discovery as to any psychiatric evidence that the defense would be presenting.  
 15 Defense counsel responded that "we have retained Dr. Masters just for that purpose, and Dr.  
 16 Masters talked to Mr. Alford approximately two months ago."<sup>74</sup>

17 On October 18, 1996, the state district court issued an order submitted by defense  
 18 counsel authorizing a contact visit with petitioner by Dr. Master.<sup>75</sup>

19 Also on October 18, 1996, defense counsel filed a motion in limine to allow the  
 20 testimony of Dr. Master. The motion stated that Dr. Master "will opine that the Defendant  
 21 acted in the heat of passion, and correlatively, without the premeditation/deliberation  
 22 necessary to sustain a First Degree Murder conviction."<sup>76</sup>

23 *////*

---

24  
 25 <sup>73</sup>#25, Exhs. 65 & 66.

26 <sup>74</sup>#25, Ex. 71.

27 <sup>75</sup>#25, Ex. 73.

28 <sup>76</sup>#25, Ex. 74.

1 At the opening of the trial on October 21, 1996, the state trial court took up pending  
2 motions and other preliminary matters outside the presence of the jury. The court granted the  
3 motion in limine to allow Dr. Master's testimony, as law of the case. The State requested a  
4 copy of Dr. Master's report. Defense counsel responded:

5 Dr. Masters is scheduled to testify according to the  
6 subpoena Thursday afternoon. Dr. Masters in June saw Mr.  
7 Alford. He sent me a one-page evaluation, maybe two pages.  
He is faxing over a copy of that to us this afternoon, and upon its  
receipt I'll make sure that [the State] has a copy of that.

8 #25, Ex. 78, at 3. Defense counsel listed Dr. Master as one of the witnesses to be called by  
9 the defense. *Id.*, at 14 & 21.

10 Petitioner entered a plea after the State's first witness. Neither Dr. Master nor any  
11 other defense witness was called to testify.

12 In his *pro se* state post-conviction petition, petitioner claimed that his trial counsel was  
13 ineffective for failing to adequately prepare and secure a complete psychiatric evaluation by  
14 Dr. Master in advance of the second trial. #27, Ex. 116, at 20-22. Petitioner attached, *inter*  
15 *alia*, his supporting purported affidavit, which was not notarized, in which he stated:

16 5. That my trial counsel did not investigate into how Dr.  
17 Master's psychiatric evaluation was coming along in order to be  
18 prepared for trial, or he would have known that Dr. Master had  
19 only interviewed me on one occasion for 2 hours on August 4,  
20 1996, at which time Dr. Master indicated to me that the interview  
was for the sole purpose of a preliminary evaluation to see if he  
could assist with the defense. Nevertheless, I did not see Dr.  
Master again, and as such, the psychiatric evaluation was never  
completed for trial.

21 6. That as of the third day of my trial on October 23, 1996,  
22 I had still not seen Dr. Master again in order to complete the  
psychiatric evaluation and have it ready and prepared for trial.

23 #27, Ex. 116, Petitioner's Ex. "D" thereto (voir dire was conducted the first two trial days).

24 Alford did not submit any affidavits or other evidence, however, tending to establish  
25 either: (a) the content of Dr. Master's initial report or that the report provided insubstantial  
26 support for the defense state of mind theory; (b) the additional evidence that would have been  
27 developed on an allegedly more complete evaluation; or (c) the inability of Dr. Master to  
28 complete any allegedly incomplete evaluation prior to his testimony in the defense case.

1 The state district court rejected the claim on the following basis:

2 With regard to Defendant's claim of his counsel's failure to  
 3 prepare and secure adequate psychiatric evaluation, Defendant  
 4 submits only conclusory statements that are repelled by the  
 5 record. *Hargrove, supra.* [*Hargrove v. State*, 100 Nev. 498, 502-  
 6 03, 686 P.2d 222, 225 (1984).] By filing a motion in limine to allow  
 7 the testimony of Dr. Masters, it appears to this Court that the  
 defense counsel intended to call him as a witness and were  
 satisfied with the evaluation they had received. Defendant has  
 made no showing of prejudice and is unable to meet the  
 requirements of *Strickland* to show ineffective assistance of  
 counsel. As such, this issue is dismissed.

8 #27, Ex. 119, at 6-7, ¶ 16.

9 The Supreme Court of Nevada rejected this claim in the group of claims that it rejected  
 10 on the basis that "Alford has not demonstrated that the district court's findings of fact are not  
 11 supported by substantial evidence or are clearly wrong."<sup>77</sup>

12 The state courts' rejection of Ground 1(b) was not an objectively unreasonable  
 13 application of *Strickland* and *Hill*. It is axiomatic that the petitioner must establish both  
 14 deficient performance and resulting prejudice. The claim of prejudice that petitioner  
 15 presented to state courts was wholly speculative, in that he did not support the petition with  
 16 any affidavits or other evidence<sup>78</sup> tending to establish either the content of the psychiatrist's  
 17 initial report, the additional evidence that an allegedly more complete psychiatric evaluation  
 18 by Dr. Master would have produced, or the inability of defense counsel to present a viable  
 19 defense in its case in chief based upon Dr. Master's psychiatric testimony due to the alleged  
 20 delay. That is, establishing only that counsel allegedly could have done more sooner does  
 21 not establish either that the psychiatric evidence actually developed was inadequate or that  
 22 a complete and sufficient defense on this point could not have been presented at trial. It thus  
 23 was not unreasonable to conclude that petitioner had failed to come forward with sufficient  
 24 supporting facts to establish that, viewed objectively, there was a reasonable probability that,

---

26 <sup>77</sup>#27, Ex. 132, at 3-4.

27 <sup>78</sup>N.R.S. 34.370(4) requires that affidavits, records, or other evidence supporting the allegations in the  
 28 petition must be attached with the state petition.

1 but for the claimed error, petitioner would not have pled guilty and would have insisted on  
2 going to trial. It therefore was not objectively unreasonable to reject the claim for failure to  
3 assert critical facts with regard to prejudice.

4 Ground 1(b) therefore does not provide a basis for federal habeas relief.

5 ***Ground 1(c): Communication with Petitioner and Preparation for Trial***

6 In Ground 1(c), petitioner alleges that he was denied effective assistance of trial  
7 counsel when counsel failed to reasonably communicate with him and to prepare for trial.

8 As noted previously, prior to the second trial, new defense counsel from the state  
9 public defender's office ultimately was appointed to represent petitioner in place of counsel  
10 from the county public defender. However, on March 13, 1996, petitioner initially refused to  
11 allow the state public defender to be appointed to represent him. After a *Faretta* colloquy, he  
12 elected to represent himself on the charge of first degree murder with use of a deadly  
13 weapon. After a month passed, on April 15, 1996, he changed his mind and allowed the state  
14 public defender to be appointed as his counsel.<sup>79</sup>

15 After only two months, however, by letter dated June 17, 1996, Alford advised defense  
16 counsel that he was terminating the attorney-client relationship and that he had filed a  
17 complaint with the state bar association. On June 24, 1996, petitioner moved for the  
18 withdrawal of defense counsel on the ground that counsel had done little or nothing to prepare  
19 for the upcoming trial. At the ensuing hearing on the motion, petitioner acknowledged that  
20 he had refused to cooperate with the defense investigator when he came for a scheduled  
21 visit, on the basis that he had filed a complaint with the bar association and a conflict existed.  
22 The state district court denied petitioner's motion for withdrawal of counsel. Petitioner  
23 thereafter cooperated with defense counsel and the trial subsequently was continued to  
24 October 1996.<sup>80</sup>

25 *///*

---

26  
27 <sup>79</sup>#25, Exhs. 59 & 60.

28 <sup>80</sup>#25, Ex. 67; Ex. 69, at 6; Ex. 70.

1 At an October 11, 1996, calendar call, Alford again objected to continued  
2 representation by the state public defender, alleging that counsel had failed to prepare for the  
3 case, allegations that defense counsel strongly contested. The matter was continued one  
4 week per a prior agreement between counsel for the State and defense.<sup>81</sup>

5 In his state post-conviction petition, Alford alleged that his counsel failed to reasonably  
6 communicate with him and to prepare for trial.<sup>82</sup>

7 In his supporting purported affidavit, Alford stated that he had only minimal contact with  
8 defense counsel, the psychiatrist, and the investigator before trial. He further stated that  
9 defense co-counsel, Nancy Lemcke, stated to him that LaPorta had not reviewed the file,  
10 which was in the same condition in which it had been received; that he had “pulled the same  
11 c—” in a death penalty hearing that she had second-chaired with him a couple of months  
12 before; that LaPorta did well considering the lack of preparation but could have spared the  
13 defendant’s life if he had prepared; that she was “p—ed off” at him; and that she could not  
14 possibly be ready for trial. Alford stated that on June 29, 1996, he gave the investigator a list  
15 naming thirty-four potential witnesses but that it had been verified that only eight of these  
16 witnesses were ever contacted. Alford did not identify the remaining witnesses who were not  
17 contacted or the content of their anticipated testimony.<sup>83</sup>

18 Petitioner also submitted copies of earlier sworn declarations from his motion to  
19 withdraw guilty plea by Lemcke and the defense investigator, Jerome Dyer. These  
20 declarations pertained to the issue of the letters and did not provide corroborating factual  
21 support for this claim. In particular, Lemcke made no statements as to a general lack of  
22 preparation by lead counsel, and Dyer made no statements regarding witness leads that were  
23 not pursued. #27, Ex. 116, Petitioner’s Exhs. “A” and “B” thereto.

24 ////

---

25  
26 <sup>81</sup>#25, Ex. 71.

27 <sup>82</sup>#27, Ex. 116, at 28-32.

28 <sup>83</sup>#27, Ex. 116, Petitioner’s Ex. “D” thereto, at 2-5, ¶¶ 7-18.



Petitioner additionally submitted sworn declarations by his mother, Catherine Moses, by her friend, Sharon Morehouse, and by his father, Frederick Alford, Sr. The witnesses attested to conversations that they had with petitioner prior to and at the start of the trial. Collectively, the witnesses attested that petitioner said prior to the trial that he felt that his attorneys were not prepared but he wanted to go to trial; that petitioner said that he had been presented with a better plea offer prior to the trial, one life sentence with the possibility of parole, but had rejected it; and that petitioner took the less favorable plea at trial only after the State relied on the letters to his wife in opening statements.<sup>84</sup>

Petitioner submitted no declarations, affidavits or other evidence identifying the trial witnesses that he alleges were not contacted or the content of their anticipated testimony.

The state district court rejected the claim on the following basis:

24. Defendant's final contention that his counsel failed to adequately communicate with him and failed to prepare for trial is belied by the record and does not justify an evidentiary hearing. Hargrove, supra.

25. Defendant bears the burden of demonstrating that his counsel was not prepared. Under Strickland, defense counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, at 691, 104 S.Ct. at 2066. Here Mr. LaPorta's representations to the court on the record, make it clear that he had conducted reasonable investigations, despite Defendant's unfounded allegations.

26. Defendant's additional contention that Mr. LaPorta failed to communicate with him appears to stem more from a complaint as to the frequency of visits by Mr. LaPorta than a failure to inform Defendant of specific information regarding his case. To that extent, the Sixth Amendment does not guarantee a meaningful relationship between the accused and his counsel. Morris v. Slappy, 461 U.S. 1, 13, 103 S.Ct. 1610, 1617 (1983). "The Sixth Amendment guarantees every defendant the right to counsel and requires that counsel be adequate and effective, but does not guarantee that every defendant will have a meaningful relationship with his counsel and does not guarantee counsel of defendant's choice." Barnes v. Housewright, 603 F.Supp. 330, 331-332 (1985).

---

<sup>84</sup>#27, Ex. 116, Petitioner's Exhs. "G", "H" and "I" thereto.



1                   27. Defendant has failed to meet his burden of proof to  
 2                   show ineffective assistance of counsel. The record instead  
 3                   demonstrates that Defendant was uncooperative with counsel in  
 4                   his preparation for trial. As such, this issue is dismissed.

5                   #27, Ex. 119, at 8-9, ¶¶ 24-27.

6                   The Supreme Court of Nevada rejected this claim in the group of claims that it rejected  
 7                   on the basis that “Alford has not demonstrated that the district court’s findings of fact are not  
 8                   supported by substantial evidence or are clearly wrong.” #27, Ex. 132, at 3-4.

9                   The state court decision rejecting this claim was not an objectively unreasonable  
 10                  application of *Strickland* and *Hill*. Regardless of the conflicting statements concerning  
 11                  defense counsel’s level of preparation, petitioner came forward with no evidence of resulting  
 12                  prejudice in support of this claim in the petition, as was required by state post-conviction  
 13                  procedure under N.R.S. 34.370(4). The petition and supporting materials failed to identify the  
 14                  witnesses who allegedly were not contacted and the alleged need for their testimony, in a  
 15                  case that already had been tried to a verdict and judgment once before. Petitioner therefore  
 16                  failed to come forward with evidence of prejudice of sufficient specificity to lead to the  
 17                  conclusion that, viewed objectively, there was a reasonable probability that, but for the  
 18                  claimed error, he would not have pled guilty and would have insisted on going to trial.

19                  Indeed, petitioner’s allegations and declarations, to the extent that they contained  
 20                  admissible evidence,<sup>85</sup> cut directly against his claim that the alleged lack of communication  
 21                  and preparation caused him to enter a plea rather than go to trial. Petitioner undeniably was,  
 22                  as his father stated in his declaration, “well aware” of his own dissatisfaction with what he  
 23                  perceived to be inadequate communication and preparation by defense counsel; but he  
 24                  nonetheless intended to proceed to trial. The declarations reflect that Alford did not change  
 25                  his mind until after the State’s reliance in opening statements on his letters to his ex-wife.<sup>86</sup>

---

26                  <sup>85</sup>Much of what was stated in the declarations likely would have been hearsay that would not have  
 27                  been admissible to prove the truth of the matter asserted therein.

28                  <sup>86</sup>Petitioner also made allegations on this claim with respect to an allegedly more lenient plea offer  
 allegedly made by the State prior to trial that he would have taken but for the ineffective assistance of

(continued...)

1 The state court decision rejecting this claim therefore was not an objectively  
2 unreasonable application of clearly established federal law.

3 Ground 1(c) therefore does not provide a basis for federal habeas relief.

4 ***Ground 1(d): Petitioner's Letters to His Ex-Wife***

5 In Ground 1(d), petitioner alleges that he was denied effective assistance of trial  
6 counsel when counsel failed to timely review and address petitioner's letters to his ex-wife that  
7 the State referred to in opening statements. In particular, petitioner alleges that trial counsel's  
8 failure to review the letters constituted ineffective assistance because counsel accordingly  
9 failed to move effectively to exclude the letters, failed to prepare to defend against them, and  
10 failed to take them into account in plea negotiations. Petitioner maintains that the letters  
11 became a "devastating bombshell" to the defense only because of trial counsel's lack of  
12 preparation, and that, at the very least, defense counsel "could have negotiated a plea – very  
13 likely a better plea –" if they had reviewed and considered the letters earlier.

14 Petitioner first raised a claim of ineffective assistance of counsel based upon a failure  
15 to review the letters in a motion to withdraw plea that was filed before sentencing. The motion  
16 was filed by new appointed counsel not connected with the state public defender's office,  
17 Patricia Erickson. Petitioner claimed that he was prejudiced because he had rejected a more  
18 favorable plea offer prior to trial pursuant to which he allegedly could have entered a plea only  
19 to a charge of first degree murder without a weapon enhancement and would have been  
20 sentenced to a single life sentence with the possibility of parole.<sup>87</sup>

21 *///*

22  
23 <sup>86</sup>(...continued)

24 counsel. Resolution of this particular claim does not appear in truth to turn upon these allegations, however.  
25 Petitioner alleges that he rejected the alleged offer and elected to proceed to trial despite being dissatisfied,  
26 as he apparently was from the very outset, with defense counsel's level of communication and preparation,  
27 such that petitioner's claim is not even internally consistent in this regard. Further, as noted in the text,  
28 petitioner cannot establish prejudice under the governing standard in *Hill*, which is an objective rather than a  
subjective standard. To the extent, if any, that the allegations regarding the allegedly more lenient offer have  
any material bearing on this claim, the Court adopts and incorporates the discussion regarding the alleged  
offer, *infra*, under Ground 1(d), as if set forth *in extenso* herein.

<sup>87</sup>#26, Ex. 94.

1           Petitioner attached, *inter alia*, a sworn declaration by defense co-counsel, Nancy  
2 Lemcke, together with his own sworn declaration.

3           Nancy Lemcke attested to the following.<sup>88</sup> She began assisting LaPorta in mid-October  
4 1996 for the upcoming trial. The two lawyers divided up responsibility for the respective  
5 witnesses between them, and Lemcke's primary witness for preparation for cross-examination  
6 was Ann Alford. Lemcke attached both a list showing the breakdown of responsibility and her  
7 notes showing her anticipated cross-examination of Ann Alford. Lemcke's plan was "to follow  
8 a chronological examination of her contacts with the defendant in order to prove that on the  
9 day of the killing of Johnny Richardson that Ann Alford was continuing her relationship with  
10 defendant Frederick Alford and thus prove that when Frederick Alford arrived at the trailer he  
11 was surprised to find Mr. Richardson in Ann Alford's bedroom."<sup>89</sup>

12           Several days before the start of the trial, LaPorta informed Lemcke that he had  
13 received several letters from the prosecution and that she should review the letters. LaPorta  
14 did not discuss the content of the letters. Lemcke retrieved the letters from LaPorta's desk,  
15 but she did not review them prior to the State's opening statement. She did not realize the  
16 import of the letters until hearing the opening statement. She stated that "it is my opinion that  
17 these letters were devastating to the defense that I intended to present at trial."<sup>90</sup>

18           In a chambers conference, Lemcke and LaPorta challenged the introduction of the  
19 letters as inadmissible other bad acts evidence as to which the State had not filed the  
20 required pretrial notice. The state trial judge rejected this challenge and indicated that he was  
21 going to permit the State to introduce the letters. Defense counsel then had a "lengthy  
22 discussion" with petitioner regarding the impact of the letters on his defense, and he ultimately  
23 decided to accept the offered plea. Lemcke stated in her declaration that "it is my belief that  
24

---

25           <sup>88</sup>In summarizing evidence, the Court again makes no findings of fact or credibility determinations as  
26 to the truth or falsity of the evidence submitted, whether at trial or in other proceedings.

27           <sup>89</sup>#26, Ex. 94, Ex. "B" thereto and attachments.

28           <sup>90</sup>#26, Ex. 94, Ex. "B" thereto and attachments.

1 Mr. Alford finally entered his guilty plea because of the impact of the letters upon his  
2 defense.”<sup>91</sup>

3 Lemcke did not make any statement in her declaration that, before trial, the State had  
4 made an offer pursuant to which petitioner could plead guilty to first degree murder and  
5 receive a single life sentence with the possibility of parole. Nor was any such sworn  
6 statement by LaPorta offered in support of the motion.

7 Alford attested that on October 10, 1997, “Mr. LaPorta informed me that my case could  
8 be negotiated if I would agree to enter a guilty plea to one count of first degree murder and  
9 I would be sentenced to [a] life with the possibility of parole sentence on this charge.” Alford  
10 attested that he was not informed before trial by anyone with the defense of either the  
11 existence of the letters or of their impact on his defense. He further attested that “[i]f Mr.  
12 LaPorta had informed me of the existence of these letters, and had discussed the impact of  
13 these letters on my defense, I would have agreed to enter a plea to one count of first degree  
14 murder given the fact that I would be eligible for parole after incarceration of ten years.” He  
15 attested that he entered a plea at trial because of the conversations with counsel that, for the  
16 first time, “informed me of the impact that these letters would have on the defense of my case  
17 . . . and made me able to comprehend the impact the letters would have on my defense.”<sup>92</sup>

18 The State’s opposition, *inter alia*, asserted: “the State never made an offer of straight  
19 First Degree Murder, Life with Parole. Discussions were had concerning the possibility of  
20 negotiating this case, but no offers were extended.” The opposition further asserted that  
21 “[a]pproximately two weeks before the trial began, the State gave to defense counsel copies  
22 of letters written by the defendant to Ann Alford.”<sup>93</sup>

23 / / / /

---

24  
25 <sup>91</sup>#26, Ex. 94, Ex. “B” thereto and attachments. The defense investigator, Jerome Dyer, attested that  
26 he did not receive the letters in discovery or at any other time prior to trial and that he was surprised when he  
heard about the letters in the State’s opening statement. *Id.*, Ex. “C” thereto.

27 <sup>92</sup>#26, Ex. 94, Ex. “F” thereto.

28 <sup>93</sup>#27, Ex. 95, at 5.

1 The state district court heard oral argument on the motion to withdraw. Defense  
 2 motion counsel stated, *inter alia*, that the prosecutor had informed her that he received the  
 3 letters two weeks before he turned them over to defense trial counsel, *i.e.*, about a month  
 4 before trial. Defense motion counsel further pointed to the State's failure to correct the  
 5 following statement by petitioner from a hearing ten days before trial:

6 THE DEFENDANT: . . . . . I don't trust this man  
 7 [LaPorta]. He's trying to convince me that I should plead to a first  
 8 degree murder conviction and that I would only have to do three  
 9 years on a ten-to-life because I already have five years in.

10 #25, Ex. 71, at 4. Counsel, however, did not quote LaPorta's immediately following response:

11 MR. LAPORTA: Judge, that is – this really [is] getting  
 12 ridiculous. That's absolute nonsense. I took to him what was  
 13 potentially a possible one. He rejected it. That was it.

14 . . . . . I have not attempted to convince this man to take a  
 15 negotiation. This is just barefaced misrepresenting things to you.

16 *Id.*, at 4-5. At the motion hearing, the prosecutor, *inter alia*, reiterated that "there has been  
 17 no prejudice because no offer was ever extended to the defendant to [plead] guilty to one  
 18 count of first degree murder, life with." The state district court denied the motion finding that  
 19 the plea was entered voluntarily and knowingly.<sup>94</sup>

20 The Supreme Court of Nevada affirmed, making a key factual finding:

21 In this case, Alford alleges that but for counsel's errors, he  
 22 would have accepted a more lenient offer from the state.  
 23 Assuming that Alford's attorneys performed deficiently, we  
 24 conclude that Alford has shown no prejudice because he fails to  
 25 show that the state ever offered him a more lenient plea bargain.

26 Alford alleges that about two weeks before trial, his  
 27 counsel told him that if he pled guilty to first-degree murder, he  
 28 would receive a life sentence with the possibility of parole. The  
 prosecutor represented to the district court that the state never  
 made such an offer. As factual support for his allegation, Alford  
 cites a hearing ten days before the second trial at which he told  
 the court that his counsel was "trying to convince me that I should  
 plead to a first-degree murder conviction and that I would only  
 have to do three years on a ten-to-life." Alford argues that the  
 fact that the prosecutor was present and did not challenge his

---

<sup>94</sup>#27, Ex. 99, at 3, 8 & 9-11.

1 remark shows that the state made such an offer. We disagree.  
 2 The state did not need to respond to Alford's remark for two  
 3 reasons. First, the existence or nature of a plea negotiation was  
 4 not at issue; Alford was expressing dissatisfaction with his  
 5 counsel's preparation for trial. Second, Alford's own counsel  
 6 immediately responded to Alford's claim, calling it "absolute  
 7 nonsense."

8 *We conclude that the record shows that the state never*  
 9 *offered Alford a plea bargain in which it would recommend a*  
 10 *sentence of one term of life in prison with the possibility of parole.*  
 11 Therefore, Alford was not prejudiced by any failure of his  
 12 attorneys to properly deal with the letters in question.

13 #27, Ex. 108, at 2-3 (emphasis added).

14 In his state post-conviction petition, Alford asserted, *inter alia*, claims that his trial  
 15 counsel were ineffective for failing to review the letters sooner and for failing to move to  
 16 exclude the letters on the basis of authenticity and reliability. He maintained that the three  
 17 letters were inadmissible because none of the letters were accompanied by a postmarked  
 18 envelope, two of the letters did not have the name of the sender or author of the letter or a  
 19 signature, one letter additionally was typewritten, and the only signed letter allegedly did not  
 20 ask Ann Alford to lie. He did not allege that counsel were ineffective for failing to make a  
 21 more effective effort to exclude the letters as inadmissible other bad acts evidence.<sup>95</sup>

22 In his supporting purported affidavit, petitioner described an entirely different factual  
 23 scenario regarding the pretrial plea discussions than he attested to in his prior declaration:

24 13. That due to my frustration with [my] counsel's failure  
 25 to communicate with me and participate in preparing my defense,  
 26 on Monday, August 26, 1996, I personally called the District  
 27 Attorney's Office and talked to [prosecutor] David Schwartz for 20  
 28 to 30 minutes. During this conversation, I informed Mr. Schwartz  
 that I would be willing to plead guilty to no more than Second  
 Degree Murder. At the conclusion of the conversation Mr.  
 Schwartz stated that he had no problem with this plea and  
 advised me to have Mr. LaPorta contact him to draw up the  
 negotiations.

14. That pursuant to Mr. Schwartz' instructions, I made  
 numerous attempts to contact Mr. LaPorta by telephone and  
 when he finally did talk to me, Mr. LaPorta refused to contact the

---

<sup>95</sup>See #27, Ex. 116, at 19-20 & 24-25; *id.*, Ex. 129, at 19-20 & 23-24.

1 DA and make the negotiations, stating that he didn't have the  
 2 time and that if the DA would offer this then he would surely  
 reduce the charge to a lower charge as we got closer to trial.

3 #27, Ex. 116, Ex. "D" thereto, at 3-4.<sup>96</sup>

4 In rejecting petitioner's claim, the state district court found that petitioner "was aware  
 5 of the existence and substance of these letters primarily because he was the author, but also  
 6 because he was present during testimony regarding the letters from Ann Alford and Sherry  
 7 Rollins during his first trial." The court concluded that Alford could not show both deficient  
 8 performance and resulting prejudice because: (a) he had "presented no basis to expect the  
 9 jury would not have heard about the letters regardless of the timing of their review by his  
 10 defense counsel;" and (b) he could not "claim that he would not have pleaded guilty had  
 11 defense counsel been more thoroughly prepared regarding the impact of these letters when  
 12 the substance of the letters had previously been elicited at the first trial and all parties were  
 13 aware and prepared for this testimony." The court further noted that if Alford had gone to trial  
 14 and been convicted there was a "high likelihood that he would have been sentenced, once  
 15 again, to life without the possibility of parole."<sup>97</sup>

16 With regard to the alleged failure to challenge the admissibility of the letters on the  
 17 basis of authenticity and reliability, the state district court held, *inter alia*, as follows:

18 Furthermore, Defendant must show prejudice by his  
 19 counsel's actions . . . . Defendant has asserted no basis  
 20 whatsoever for counsel to preclude the admission of the letters in  
 21 question. He has presented no legal theory counsel should have  
 22 asserted and has not shown that even had such a motion been  
 raised that it would have been meritorious. This contention of  
 ineffective assistance of counsel is meritless and thus, is  
 dismissed.

23 #27, Ex. 119, at 7-8, ¶21.

---

24  
 25 <sup>96</sup>See also *id.*, Exhs. "G", "H" and "I" thereto (declarations by petitioner's mother, father, and an  
 26 acquaintance attesting to his alleged statements that he had been offered a one life sentence with parole plea  
 27 offer prior to the trial). The Court notes again that these statements would be inadmissible hearsay to prove  
 the truth of the matter asserted with regard to what, if any, plea offer was made prior to trial.

28 <sup>97</sup>#27, Ex. 119, at 2., ¶7, & 6, ¶¶ 14 & 15.



1 The state high court affirmed, holding that “Alford has not demonstrated that the district  
2 court’s findings of fact are not supported by substantial evidence or are clearly wrong.”<sup>98</sup>

3 On federal habeas review, this Court will assume, *arguendo*, that the failure to review  
4 and address the letters constituted deficient performance. The issue therefore focuses on  
5 the prejudice component of the *Strickland* test. In this regard, petitioner claims that he was  
6 prejudiced specifically by counsel’s failure to move effectively to exclude the letters, failure  
7 to prepare to defend against them, and failure to take the letters into account in plea  
8 negotiations. The Court will take up the prejudice issue for each claimed deficiency in turn.

9 Petitioner first contends that trial counsel was ineffective for failing to move effectively  
10 to exclude the letters. Petitioner maintains that trial counsel did not “vigorously” challenge the  
11 admission of the letters and that no motion was filed to challenge the authenticity of the letters  
12 or their admissibility as other bad acts evidence excluded by N.R.S. 48.045(2).<sup>99</sup> Petitioner  
13 contends that N.R.S. 48.045(2) required prior notice by the State and a pretrial hearing.

14 To the extent that the claim is based upon an alleged failure to move effectively to  
15 exclude the letters as other bad acts evidence, the claim is not exhausted. Alford presented  
16 no such claim to the state courts. The Court exercises its discretion to proceed to the merits  
17 of the unexhausted claim, however, given the late stage of these proceedings and the lack  
18 of merit of the claim. See *Granberry, supra*. The Court will apply a *de novo* standard of  
19 review to this particular claim because the state courts never considered, or were given the  
20 opportunity to consider, the unexhausted claim on the merits.

---

21  
22 <sup>98</sup>#27, Ex. 132, at 3-4.

23 <sup>99</sup>This Nevada evidence rule substantially tracks Rule 404(b) of the Federal Rules of Evidence, and  
24 provides as follows:

25 Evidence of other crimes, wrongs or acts is not admissible to prove  
26 the character of a person in order to show that he acted in conformity  
27 therewith. It may, however, be admissible for other purposes, such as proof  
28 of motive, opportunity, intent, preparation, plan, knowledge, identity, or  
absence of mistake or accident.

N.R.S. 48.045(2).



1 As petitioner acknowledges, the evidence that he presented on the motion to withdraw  
 2 guilty plea in the state court sought to establish that trial counsel did in fact challenge the  
 3 admissibility of the evidence under N.R.S. 48.045(2) in a chambers conference and that the  
 4 state district court rejected the challenge. Quite critically, petitioner has not come forward with  
 5 any apposite Nevada authority establishing that an earlier and/or more “vigorous” challenge  
 6 based upon N.R.S. 48.045(2) would have produced a different outcome. Nor can he, as the  
 7 available state authorities regarding Nevada evidence rules and federal authorities applying  
 8 substantially similar evidence rules do not support petitioner’s position.

9 In *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), the Supreme Court of Nevada  
 10 addressed a claim that N.R.S. 48.045(2) barred admission of evidence that the defendant  
 11 attempted to influence the testimony of a witness, in that case via threats of violence. The  
 12 witness testified that she was reluctant to cooperate with prosecutors because the defendant  
 13 had threatened her twice and she feared him. The court rejected the proposition that N.R.S.  
 14 48.045(2) applied to bar evidence of such attempts to influence a witness’ testimony:

15 . . . [W]e consider NRS 48.045(2) to be inapposite.  
 16 Evidence that after a crime a defendant threatened a witness with  
 17 violence is directly relevant to the question of guilt. Therefore,  
 18 evidence of such a threat is neither irrelevant character evidence  
 nor evidence of collateral acts requiring a hearing before its  
 admission.

19 117 Nev. at 628, 28 P.3d at 512 (footnotes omitted). The court cited its prior decision in  
 20 *Abram v. State*, 95 Nev. 352, 594 P.2d 1143 (1979), which stated that “[d]eclarations made  
 21 after the commission of the crime which indicate consciousness of guilt, or are inconsistent  
 22 with innocence, or tend to establish intent may be admissible” and held that threats against  
 23 a witness may be admitted as evidence of consciousness of guilt. 95 Nev. at 356-57, 594  
 24 P.2d at 1145.

25 Federal cases applying similar evidence rules also conclude that evidence of attempts  
 26 to induce witnesses to lie is admissible evidence of consciousness of guilt. *See, e.g., United*  
 27 *States v. Collins*, 90 F.3d 1420, 1428 (9<sup>th</sup> Cir. 1996); *United States v. Castillo*, 615 F.2d 878,  
 28 885 (9<sup>th</sup> Cir. 1980); *United States v. Brashier*, 548 F.2d 1315, 1325 (9<sup>th</sup> Cir. 1976).

1       Petitioner cites no apposite Nevada state case law contrary to the foregoing state and  
2 federal authorities, which establish the admissibility of evidence of attempts to influence a  
3 witness' testimony over a challenge under N.R.S. 48.045(2) or comparable federal evidence  
4 rules. The letters in question reflected a clear consciousness by Alford of the existence of  
5 facts that tended to establish his guilt and of his effort to have his ex-wife lie on the stand to  
6 conceal or contradict those inculpatory facts.

7       Petitioner thus cannot establish that, viewed objectively, there was a reasonable  
8 probability that, but for the failure to challenge the admission of the letters more vigorously  
9 as other bad acts evidence, petitioner would not have pled guilty and instead would have  
10 insisted on going to trial. It would appear that such a challenge to the letters would not likely  
11 have resulted in their exclusion. This aspect of the claim, on *de novo* review, thus fails to  
12 establish a basis for federal habeas relief.

13       Turning to the claim that trial counsel was deficient for failing to seek the exclusion of  
14 the letters on the basis of authenticity and reliability, petitioner similarly cites no apposite  
15 authority tending to establish that the letters likely would have been excluded on a challenge  
16 to their authenticity or reliability. Mere supposition does not carry the petitioner's burden on  
17 either state post-conviction or federal habeas review. The state court's rejection of this aspect  
18 of petitioner's claim for lack of any supporting legal foundation therefore was not an  
19 objectively unreasonable application of clearly established federal law.

20       Petitioner next contends that he was prejudiced by counsel's failure to prepare to  
21 defend against the letters. He posits that the letters were "devastating to the defense" only  
22 because trial counsel were "caught off guard" and then pressured him to enter a plea. He  
23 maintains that competent counsel would not have been surprised by the letters and "would  
24 have known that other evidence would adequately support Alford's defenses." Petitioner  
25 refers to testimony by the babysitters establishing that he did not have a knife in his hand  
26 when he entered the bedroom and allegedly establishing that he did not expect to discover  
27 Ann Alford and Johnny Richardson in bed together; and he further points to testimony tending  
28 to establish that Ann Alford and Frederick Alford had a continuing relationship at the time of

1 the killing. Petitioner posits that “[i]n short, the letters did not eliminate Alford’s defense and,  
2 even if admitted, their prejudicial impact could have been minimized,” such that “the letters  
3 would not have been a bombshell causing the defense to collapse.”<sup>100</sup>

4 Petitioner thus claims that defense counsel could have largely negated the impact of  
5 the letters with the countervailing evidence from the first trial if only they had reviewed and  
6 addressed the letters sooner. This claim is problematic in two respects.

7 First, no competent evidence, as supposed to supposition or uncorroborated  
8 inadmissible hearsay, was tendered to the state courts<sup>101</sup> tending to establish that trial counsel  
9 were not prepared to bring out the countervailing evidence. Indeed, with respect to Ann  
10 Alford’s testimony, the evidence that petitioner offered in support of his motion to withdraw  
11 guilty plea tended to establish that Nancy Lemcke in fact had fully prepared a cross-  
12 examination of Ann Alford that would explore all of the points regarding her relationship with  
13 Frederick Alford. Petitioner never has offered any competent evidence by anyone with  
14 personal knowledge tending to establish that defense counsel would not have been able to  
15 bring out all of the remaining countervailing evidence at the second trial.

16 Second, and more importantly, all of the countervailing evidence to which petitioner  
17 refers in fact was fully explored in his first trial. This Court has canvassed the countervailing  
18 evidence at length in the background section of this order; and, viewed objectively, the  
19 evidence is not nearly as compelling as petitioner would suggest.<sup>102</sup> Nor did the first jury find

---

21 <sup>100</sup>#53, at 14-16.

22 <sup>101</sup>N.R.S. 34.370(4) requires that affidavits, records, or other evidence supporting the allegations in  
23 the petition must be attached with the state petition.

24 <sup>102</sup>For example, the babysitters’ testimony hardly establishes that Frederick Alford did not expect to  
25 discover Ann Alford and Richardson in bed together. Rather, evidence -- including testimony from babysitter  
26 Michelle Smith -- that tended to establish that petitioner broke down the door would tend to establish exactly  
27 the opposite inference. If Alford was expecting instead only to find Ann Alford in the bedroom, he would have  
28 had no reason to break down the door. (Evidence further tended to establish that, before entering the trailer,  
Frederick Alford parked his vehicle immediately next to Richardson’s vehicle. E.g., #23, Ex. 31, at 166-68; Ex.  
32, at 152-53; #26, Ex. 83, at 52.) Moreover, looking to the evidence overall, the forensic examination and  
autopsy of Richardson’s body strongly suggested a concerted and sustained effort by Alford to take

(continued...)

1 it to be so. At the end of that trial, Alford was found guilty of first degree murder with the use  
2 of a deadly weapon; and he stipulated to imposition of two consecutive life sentences without  
3 the possibility of parole to avoid the substantial potentiality of being sentenced instead to  
4 death.

5 Petitioner thus posits that he would have insisted on going to trial based on evidence  
6 that failed to carry the day in the first trial, without the letters, against a prosecution case  
7 strengthened considerably by direct reliance on the letters. Viewed objectively – which is the  
8 governing standard – there is not a reasonable probability that a defendant in this situation  
9 would have insisted on going to trial against a stronger case based on evidence that had  
10 failed to persuade at the first trial, and risk the substantial possibility of again being sentenced  
11 to multiple life sentences without any possibility of parole, when he instead could secure  
12 sentences that allowed for possible parole. That is, viewed objectively, the situation  
13 presented would have been substantially the same if counsel had reviewed the letters before  
14 trial. The letters still would have improved the State’s case dramatically, and the fact would  
15 have remained that reliance on the countervailing evidence had not proved successful when  
16 the case was tried to a jury without the letters. The countervailing evidence certainly was not  
17 reasonably likely to have *more* persuasive impact with the letters also in evidence.

18 The rejection of this aspect of Alford’s claim on the basis that he could not demonstrate  
19 prejudice accordingly was not an objectively unreasonable application of *Strickland*.

20 Petitioner next contends that he was prejudiced because his counsel “very likely” could  
21 have negotiated a better plea if they had reviewed the letters before trial. He alleges that an  
22 offer had been made before trial pursuant to which he could have pled guilty to first degree  
23 murder with a recommended sentence of life with the possibility of parole but that this offer  
24 was “off the table” by the time that the defense learned of the State’s use of the letters. #21,  
25 at 3; #53, at 17.

---

26  
27 <sup>102</sup>(...continued)

28 Richardson’s life as opposed to either an accidental killing in a struggle or an instantaneous unpremeditated act. Going into both trials, Alford faced a quite strong case of premeditated first degree murder.

1 This claim and supporting factual allegation run directly contrary to the Nevada  
 2 Supreme Court's factual finding that "the record shows that the state never offered Alford a  
 3 plea bargain in which it would recommend a sentence of one term of life in prison with the  
 4 possibility of parole."<sup>103</sup> The rule of deferential review of state court factual findings applies  
 5 to the factual findings of state appellate courts as well as to state trial court findings. See, e.g.,  
 6 *Little v. Crawford*, 449 F.3d 1075, 1077 n.1 (9<sup>th</sup> Cir. 2006). Petitioner has not attempted either  
 7 to show that the Nevada Supreme Court's factual finding constituted an unreasonable  
 8 determination of fact based upon the state court record or to overcome the presumption of  
 9 correctness attached to that factual finding.<sup>104</sup>

10 In all events, the contemporaneous state court record directly supports the Nevada  
 11 Supreme Court's factual finding and belies any allegation to the contrary. It does not appear  
 12 that the following portion of the record has been cited previously in either the state or federal  
 13 post-conviction proceedings. The following exchange occurred, in open court with the  
 14 defendant present, on the first morning of trial, October 21, 2006, prior to voir dire and thus  
 15 necessarily prior to the discussion of the letters in the State's opening statement:

16  
 17 THE COURT: Now, I'm going to have the jury brought  
 18 down. We'll start the jury selection. But for the record, have  
 19 there been any negotiations in the case?

20 MR. SCHWARTZ: . . . . .

---

21 <sup>103</sup>#27, Ex. 108, at 3.

22 <sup>104</sup>The Court notes that petitioner's subsequent post-conviction purported affidavit directly contradicts  
 23 his sworn declaration in support of the motion to withdraw plea. In the declaration, he attests that his counsel  
 24 conveyed an offer to him from the State to accept a plea to first degree murder with a recommended  
 25 sentence of life with parole and that he decided to reject the offer. In the purported affidavit, he attests that  
 26 the State instead conveyed an offer directly to him to accept a plea to second degree murder and that his  
 27 counsel then refused to follow through with the deal after he decided to accept it. The purported affidavit and  
 28 the sworn declaration thus directly contradict each other. Moreover, even if the purported affidavit did not  
 contradict his prior sworn and unsworn statements, the tale related in the post-conviction affidavit is fanciful to  
 the extreme. Petitioner posits that the state prosecutor took a collect call from an inmate at the Clark County  
 Detention Center and then spoke for twenty to thirty minutes with a represented defendant without his  
 counsel being present. His allegedly unprepared defense counsel then passed on the opportunity to get out  
 of the case on a plea to only second degree murder. This fanciful tale piles extreme improbability upon  
 improbability and tends to belie Alford's entire claim. The remaining post-conviction declarations by his family  
 and a friend were hearsay as to any plea offered by the State.

1 Since the remand, on my own motion I withdrew the notice  
 2 of intent [to seek the death penalty] and I have since offered Mr.  
 3 LaPorta to allow the defendant to plead guilty to first degree  
 murder with a weapon; and we agreed to two sentences of life  
 with the possibility of parole.

4 THE COURT: Has that been rejected?

5 MR. LAPORTA: Yes, your Honor. I discussed all of that  
 6 with Mr. Alford. Mr. Alford believes it's in his best interest to go to  
 trial, and that's what we're prepared to do.

7 #25, Ex. 78, at 11-12. This exchange – from a time when there was no claim or dispute  
 8 involving the status of the plea negotiations – wholly belies all of petitioner's varying,  
 9 contradictory and at times fanciful descriptions of the plea negotiations before trial. The  
 10 Nevada Supreme Court's factual finding is completely supported by the contemporaneous  
 11 record.

12 The state courts' rejection of this aspect of petitioner's claim therefore was not an  
 13 objectively unreasonable application of clearly established federal law.

14 Ground 1(d) therefore does not provide a basis for federal habeas relief.<sup>105</sup>

15 ***Ground 1(e): Factual Basis for the Home Invasion and Subornation Pleas***

16 In Ground 1(e), petitioner alleges that he was denied effective assistance of trial  
 17 counsel when counsel recommended that he plead to charges of home invasion and  
 18 subornation of perjury without there being a sufficient factual basis for either charge.

---

19  
 20 <sup>105</sup>Petitioner did not exhaust any claim in the state courts based upon a factual allegation that he was  
 21 denied a meaningful and informed opportunity to plead to two life sentences with possibility of parole by trial  
 22 counsel's failure to review the letters before trial. It is not necessarily a foregone conclusion that a plea with  
 23 two life sentences with the possibility of parole is a better deal than the plea that he entered. If parole was not  
 24 granted on either one of the two life sentences, he would be incarcerated for life. Eligibility for consideration  
 25 for possible parole does not signify if or when one will be paroled from a sentence. Further, in all events it  
 26 would appear under the laws in force at the time that petitioner would be required to serve a combined  
 27 minimum twenty years before being eligible to be paroled from the second life sentence *if* paroled from the  
 28 first life sentence at the earliest possible juncture. *See, e.g., Wesley v. State*, 112 Nev. 503, 518, 916 P.2d  
 793, 803 (1996). In contrast, on the sentences that he received, if paroled on the life sentence, his eventual  
 release then would be assured, either by parole, diminution of sentence through good time credit, or, in all  
 events, by expiration of each determinate sentence. Further, parole eligibility on non-life sentences generally  
 is available in Nevada after expiration of one-third of the sentence less good time credits. It thus is possible  
 that petitioner could achieve an earlier release under the sentences imposed than he might achieve under  
 two life sentences with the possibility of parole, even if paroled at the earliest possible juncture on each life  
 sentence. Petitioner in all events did not present a claim based upon any such factual allegation to the state  
 courts, however.

***Ground 1(e)(1): Factual Basis for the Home Invasion Plea***

On the home invasion charge, petitioner contends that a sufficient factual basis for the *Alford* plea was lacking because there was no evidence that he forcibly entered the trailer.

Under N.R.S. 205.067(1), “[a] person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.” “Forcibly enters” is defined for purposes of the statute as meaning “the entry of an inhabited dwelling involving any act of physical force resulting in damage to the structure.” N.R.S. 205.067(5)(a).

Petitioner accordingly contends that there was no evidence that he entered the dwelling with “any act of physical force resulting in damage to the structure” sufficient to sustain a conviction for, and support an *Alford* plea to, home invasion.

Petitioner was charged in an initial criminal complaint and amended criminal complaint with home invasion. The charge was dismissed in the state justice court, however, on the basis that sufficient evidence of forcible entry was not presented at the preliminary hearing. The State did not thereafter include the charge in the information prior to the first trial.<sup>106</sup>

On direct appeal after the first conviction, the Nevada Supreme Court’s background recital included the following statements:

The events on the morning of the killing were as follows: Alford arrived at his former wife's trailer home early in the morning and engaged in a conversation with two babysitters who were in the living room. He asked the babysitters if his wife was in the bedroom, and they told him that she was. *There is no evidence that at that time he had illegally entered the premises or that he was a trespasser.*

. . . . .

The information initially charged Alford with the crime of forcible home invasion. . . . . The State dismissed these charges prior to the commencement of trial; and *it appears from the evidence that Alford entered the home peaceably and probably with permission.*

. . . . .

---

<sup>106</sup>#22, Exhs. 2, 3 & 4, at 38-39. No argument is made that the discharge barred further prosecution.



1           Alford knew the trailer home and had visited it before. He  
2           entered the home peaceably and began talking with the  
3           babysitters.

4           111 Nev. at 1412 & n.2 & 1413 n.3, 906 P.2d at 1412 & n.2 & 1413 n.3 (emphasis added).

5           At the second trial, before a plea agreement was reached, Metro crime scene analyst  
6           Michael Perkins testified for the State as the first witness. According to Perkins' testimony,  
7           the door jam and striker plate on the front door showed "a lot of wear and a lot of dents in the  
8           door jam area." The door could not be secured after the incident even when the handle was  
9           locked because "the door would just pop open" when he pulled straight out on the knob  
10          without turning it. With regard to the bedroom door, he observed that the top hinge of the  
11          bedroom door "was completely busted off" and "the bottom hinge on the door was just barely  
12          hanging onto the hinge, the screws," with the door leaning up against a wall. He further  
13          testified that "[t]here were some small wood splinters in the area around the bottom of the  
14          door that led me to believe that it was a fairly recent damage to that door." On cross-  
15          examination, he elaborated extensively as to the damage; and he testified that the door  
16          "looked like it had some force applied to it."<sup>107</sup>

17          During the plea colloquy, the State incorporated the record from the prior trial, which  
18          was presided over by the same judge. The State's proffer included the following:

19                   One [of the supporting witnesses] would be Ann Alford.  
20                   She would testify that on December 22nd, 1991, she resided at  
21                   5103 East Judson. She was in bed that Sunday morning at about  
22                   7:30 or thereabouts in the morning. Her bedroom door was  
23                   kicked open or kicked in, and the defendant appeared. . . .

24                   . . . . .

25                   Additionally the baby-sitters . . . will testify that the  
26                   defendant forcibly entered the front door to that trailer, went into  
27                   the bedroom, kicked or busted opened the door . . . .

28                   The evidence will show that there was structural damage  
29                   to one or both doors in the trailer to support the home-invasion  
30                   allegation. . . . .

31          #26, Ex. 84, at 16-19 (emphasis added).

---

32                   <sup>107</sup>#26, Ex. 83, at 37, 43, 44-45, 51, 53-55, 60-64 & 66-68.



1 On state post-conviction review, petitioner contended that the absence of a factual  
 2 basis for a plea to home invasion, due to the absence of any evidence of forcible entry, was  
 3 established by the dismissal of the charge at the preliminary hearing, the statements by the  
 4 Supreme Court of Nevada on direct appeal, and the underlying testimony of the babysitters.<sup>108</sup>

5 The state district court referred to the State's proffer that the babysitters would have  
 6 testified "that Defendant forcibly entered the front door of the trailer" and that "there was  
 7 structural damage to the doors of the trailer." The court concluded on a related appellate  
 8 ineffective assistance claim as follows: "The plea canvass and the prosecutor's proffer of  
 9 evidence was relied upon by the court to show that there was a sufficient factual basis for  
 10 accepting the plea to home invasion. This Court finds the evidence proffered by the  
 11 prosecution established a sufficient factual basis." The state court accordingly denied the  
 12 related trial ineffective assistance claim.<sup>109</sup>

13 The Supreme Court of Nevada affirmed without further particularized discussion of this  
 14 claim on the basis that "Alford has not demonstrated that the district court's findings of fact  
 15 are not supported by substantial evidence or are clearly wrong."<sup>110</sup>

16 The *dicta* on the first direct appeal notwithstanding, the state courts' rejection of this  
 17 claim was not an objectively unreasonable application of clearly established federal law.

18 First, the State relied upon damage to "one or both doors" in its proffer. There was  
 19 testimony from which a rational trier of fact could infer both that the front door was forcibly  
 20 opened by Alford and that there was resulting damage. Both Rhonda Bower and Sherry  
 21 Rollins testified that, before December 22, 1991, the front door could be opened with "a little  
 22 force" or "some force." Rollins further elaborated that, before the incident, Frederick Alford  
 23 was able to open the door but neither she nor Ann Alford could do so. In contrast, after the  
 24 accident, investigating officers observed that the door opened readily. Michael Perkins

---

25  
 26 <sup>108</sup>#27, Ex. 116, at 16-17 & 25-26; Ex. 129, at 24-26.

27 <sup>109</sup>#22, Ex. 119, at 3, ¶11, 5, ¶11, & 8, ¶¶ 22 & 23.

28 <sup>110</sup>#27, Ex. 132, at 3-4.

1 testified at the first trial that “the door would open right back up” and at the second that “the  
2 door would just pop open.”<sup>111</sup> This testimony potentially supported an inference that Alford  
3 entered the front door with sufficient force to damage the door and door jamb to the point that  
4 the door thereafter was capable of being opened without the use of any force.

5 Second, there was ample evidence tending to establish that Alford used physical force  
6 that resulted in damage to the structure in kicking or busting open the bedroom door.<sup>112</sup> The  
7 definition of “inhabited dwelling” under N.R.S. 205.067 includes “any structure, building,  
8 house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer,  
9 travel trailer, motor home or railroad car in which the owner or other lawful occupant resides.”  
10 N.R.S. 205.067(5)(b). Petitioner has cited no apposite Nevada state authority holding that  
11 the act of forcibly busting open the bedroom door did not constitute either a continuation of  
12 the original entry or a forcible entry into the room itself for purposes of the statute.

13 The state courts’ rejection of the ineffective assistance claim therefore was not an  
14 objectively unreasonable application of *Strickland*.

15 The *dicta* in the Nevada Supreme Court’s decision on the first appeal does not lead  
16 to a different conclusion. The *dicta* suggests that there was no evidence that petitioner  
17 illegally entered the premises or that he was a trespasser and that it appeared from the  
18 evidence that he entered the home peaceably and with permission. These statements simply  
19 are wrong because they are directly refuted by the record at trial, which contained such  
20 evidence. There was testimony by Ann Alford that Frederick Alford did not have permission  
21 to be in the trailer and was not welcome there, and the babysitters both testified that they did  
22 not invite him over or give him permission to enter and that he walked into the trailer  
23 unannounced.<sup>113</sup> There further was evidence, reviewed above, supporting an inference that  
24 force was required to open the front door prior to the attack, tending to establish that Alford

---

25  
26 <sup>111</sup>See text and record citations, *supra*, at 11-12 & 56.

27 <sup>112</sup>See text and record citations, *supra*, at 8, 10-13 & 56.

28 <sup>113</sup>See text and record citations, *supra*, at 6, 9, 10-11 & 12.

1 forcibly opened the door that morning and walked into the trailer, all without any invitation or  
 2 permission by anyone. The Nevada Supreme Court's *dicta* did not eliminate the evidence  
 3 supporting the home invasion plea that in fact was in the record at trial.<sup>114</sup>

4 Ground 1(e)(1) accordingly does not provide a basis for federal habeas relief.

5 ***Ground 1(e)(2): Factual Basis for the Subornation of Perjury Plea***

6 On the subornation of perjury charge, petitioner contends that a sufficient factual basis  
 7 for the *Alford* plea was lacking because there was no evidence that Ann Alford committed  
 8 perjury and the completed (as opposed to attempted) crime of subornation of perjury requires,  
 9 *inter alia*, actual commission of the crime of perjury by the person suborned.

10 The respondents have not provided any argument to the contrary that directly  
 11 addresses the specific contention made in the claim.<sup>115</sup>

12 The claim appears to have merit under the Nevada case law cited to the Court.

13 In *State v. Pray*, 64 Nev. 179, 179 P.2d 449 (1947), the Supreme Court of Nevada  
 14 considered, *inter alia*, the issue of whether an attorney who allegedly induced his client to lie  
 15 under oath could be convicted of subornation of perjury based solely on the uncorroborated  
 16 testimony of the client that she had lied, under a statute prohibiting conviction of a crime  
 17 solely upon the uncorroborated testimony of an accomplice. In holding that the  
 18 uncorroborated testimony of the client was insufficient, the court stated:

19 The perjury of Mrs. Bogdewicz [the client] is an essential  
 20 element of the crime of subornation of perjury, of which the  
 21 appellant has been charged and convicted, and it is our view,  
 22 which we believe is supported by the great weight of authority,  
 23 that the accomplice rule applies in the instant case, to preclude  
 24 the conviction of the appellant upon the uncorroborated testimony  
 25 of Mrs. Bogdewicz . . . .

23 . . . . .

24 The doctrine, which we believe to be supported by the  
 25 weight of authority, and which we have above indicated we shall  
 26 follow in the instant case, is . . . as follows: 'The completed crime

---

27 <sup>114</sup>The sufficiency of the evidence presented by the State at the preliminary hearing is immaterial.

28 <sup>115</sup>See #44, at 17-18.

of subornation of perjury consists of two essential elements,- *the commission of perjury by the person suborned*, and the willfully procuring or inducing him to so do by the suborner. Gen.St.1894, § 6379. As to the first element of the crime, the suborned and the suborner are principals by virtue of the statute (Id. § 6310), and necessarily each is the accomplice of the other; hence this element of the crime cannot be established by the uncorroborated evidence of the suborned (Id. § 5767). . . . .

. . . . .

It is clear, therefore, that in the instant case, the appellant, if he suborned Mrs. Bogdewicz, as she testified he did, was, by force of the statute, a principal as to the perjury itself, involved as an element in the crime of subornation.

It follows that the appellant could not properly be convicted of the crime of subornation of perjury upon the testimony of Mrs. Bogdewicz, uncorroborated as it was . . . .

64 Nev. at 203-05, 179 P.2d at 460-61 (emphasis added). The statement of the rule that commission of perjury by the person suborned is an essential element of the completed crime of perjury clearly was material to the *Pray* holding and was not *dicta*. In its own independent research, the Court has not found any Nevada case law in any way holding or suggesting to the contrary.

It further would appear that *Pray* is fully consonant with the prevailing common law rule regarding subornation of perjury:

Another related offense recognized by the common law is "subornation of perjury." A defendant is guilty of such offense when he induces another to commit perjury. It is essential that such other person actually commit perjury. If, for whatever reason, such other person is not guilty of perjury, the defendant cannot be guilty of subornation of perjury. . . . .

4 *Wharton's Criminal Law* § 580 (15<sup>th</sup> ed., updated 2006)(footnotes omitted).

There accordingly was no factual basis for petitioner's plea to the completed crime of subornation of perjury, as Ann Alford did not commit perjury when he asked her to do so. It therefore was ineffective assistance of counsel for trial counsel to advise him to enter an *Alford* plea to the charge when there was no factual basis for such a charge on the undisputed facts. The state courts' rejection of this claim thus cannot stand, whether reviewed under a *de novo* standard or instead under the deferential AEDPA standard of

1 review.<sup>116</sup> At bottom, there simply was no factual basis for a plea to a charge of subornation  
2 of perjury.

3 Ground 1(e)(2) accordingly provides a basis for federal habeas relief, and the Court  
4 will grant the petition for a writ of habeas corpus in part to the extent that it seeks to set aside  
5 the conviction and sentence for subornation of perjury.

6 ***Ground 1(f): Motion to Withdraw Guilty Plea***

7 In Ground 1(f), petitioner alleges that he was denied effective assistance of counsel  
8 when counsel on the motion to withdraw guilty plea failed to present additional crucial  
9 arguments in support of the motion, failed to request an evidentiary hearing and to call the  
10 supporting witnesses to testify live in support of the motion, and failed to present additional  
11 affidavits or witnesses in support of the motion to withdraw guilty plea.

12 The state courts rejected this claim on the basis that, *inter alia*, petitioner could not  
13 establish prejudice because he had failed to establish that the result on the motion would  
14 have been different but for counsel's performance.<sup>117</sup>

15 The state courts' rejection of this claim was not an objectively unreasonable application  
16 of *Strickland*.

---

17  
18 <sup>116</sup>The claim presented in this Court may not have been fairly presented to the state courts and  
19 exhausted. Petitioner alleged in the state courts that there was an insufficient factual basis for the  
20 subornation plea only on the ground that the letters were not authenticated or reliable. He did not allege that  
21 there was an insufficient factual basis for the plea because Ann Alford did not commit perjury. #27, Ex. 116,  
22 at 26-28; Ex. 129, at 25-26. The State, however, has not challenged exhaustion of this claim. In any event, if  
23 the Court now were to proceed through a full analysis of, first, whether the claim is exhausted and, second,  
whether the claim now would be procedurally defaulted in the state courts as untimely or successive, the end  
result of the analysis would be that petitioner can satisfy the fundamental miscarriage of justice exception to  
the procedural default bar. In the final analysis, he simply is not guilty of the completed crime of subornation  
of perjury; and his actual innocence of this particular crime satisfies the fundamental miscarriage of justice  
exception to the procedural default bar.

24 Given that the respondents have provided no principled basis to conclude that a sufficient factual  
25 basis for a subornation of perjury plea existed, and further given the late stage of these proceedings, the  
26 Court accordingly will not protract these proceedings further to conduct yet additional proceedings directed to  
27 unexplored possible issues of exhaustion and procedural default. Any such proceedings would lead to the  
conclusion that petitioner is entitled to relief on the claim notwithstanding any arguable failure to exhaust the  
claim and any procedural default. If the merits of the claim were not reached by the state courts, due to a  
lack of exhaustion, the claim then would be subject to *de novo* review rather than deferential AEDPA review.

28 <sup>117</sup>#27, Ex. 119, at 5; Ex. 132, at 3-4.

1 This Court set forth the state court procedural history on the motion to withdraw  
 2 previously in connection with the discussion of Ground 1(d), *supra*.<sup>118</sup> The motion to withdraw  
 3 sought to set aside the plea solely on the ground that Alford was denied effective assistance  
 4 of counsel by his counsel's failure to review the letters to his ex-wife before trial. Petitioner  
 5 claimed that he was prejudiced because, if he had been properly and timely advised of the  
 6 impact of the letters, he could have accepted a pretrial plea offer to plead to a charge of only  
 7 first degree murder without a weapon enhancement with a single life sentence with the  
 8 possibility of parole.<sup>119</sup>

9 With respect to the failure to raise additional arguments, petitioner in essence alleges  
 10 that motion counsel should also have raised Grounds 1(a) and 1(c) in support of the motion  
 11 to withdraw. That is, he alleges that counsel should have included claims that the plea should  
 12 be set aside because of ineffective assistance (a) in trial counsel's failing to challenge the  
 13 felony murder theory based upon double jeopardy and (b) in trial counsel's failing to  
 14 adequately communicate with him and prepare for trial. The Court adopts its prior discussion  
 15 of these claims herein. The state courts' rejection of this aspect of Ground 1(f) was not an  
 16 objectively unreasonable application of clearly established federal law, as it does not appear  
 17 from this Court's prior discussion of the underlying claims that, viewed objectively, there is a  
 18 reasonable probability that the inclusion of either Ground 1(a) or 1(c) in the motion to  
 19 withdraw would have changed the outcome on the motion.<sup>120</sup>

20 Petitioner next contends that motion counsel was ineffective for failing to request an  
 21 evidentiary hearing and to call the supporting witnesses to testify live in support of the motion.

---

23 <sup>118</sup>See text, *supra*, at 42-46.

24 <sup>119</sup>#26, Ex. 94.

25 <sup>120</sup>See text, *supra*, at 27-33 & 38-42. The claim further is not exhausted to the extent that it alleges  
 26 that motion counsel should have included a claim that trial counsel was ineffective for failing to argue double  
 27 jeopardy. Petitioner claimed in the state post-conviction proceedings only that motion counsel failed to raise  
 28 a claim that trial counsel should have argued that the amended information failed to provide adequate notice  
 of the felony murder theory. #27, Ex. 116, at 9. The claim of a failure to raise a double jeopardy argument  
 was raised for the first time in this Court by federal habeas counsel. See also text, *supra*, at 29-32.

Petitioner cannot establish prejudice on this aspect of the claim because the contemporaneous trial record belies and flatly refutes his core factual allegation that the State offered to allow him to plead to first degree murder with only a single life sentence with the possibility of parole. As noted previously in discussing Ground 1(d), on the first day that the case was called for trial, the State and defense counsel together advised the state trial judge on the record that the State had offered to allow Alford to plead to first degree murder with the use of a weapon with a recommendation of two life sentences with the possibility of parole. This contemporaneous exchange – from a time when there was no claim or dispute involving the status of the plea negotiations – wholly belies and refutes petitioner’s claim. Petitioner thus was not prejudiced by motion counsel’s failure to request an evidentiary hearing or to call the supporting witnesses live.<sup>121</sup>

---

<sup>121</sup> See text, *supra*, at 53-54.

Indeed, much of the potential witness testimony reflected in the exhibits attached to the motion to withdraw guilty plea did not in fact suggest to the contrary by admissible evidence. Neither Nancy Lemcke nor Jerome Dyer made any statement whatsoever in their declarations that the State offered to allow Alford to plead only to first degree murder with a single life sentence with the possibility of parole. #26, Ex. 94, Exhs. B & C thereto. Petitioner’s federal habeas counsel asserts that “Alford’s prior counsel (Ms. Lemcke and Mr. LaPorta) or the investigator (Jerome Dyer) would have verified that, two weeks before trial, the State offered a plea agreement in which Alford could have pled to first degree murder and received a single life sentence of life with the possibility of parole.” #21, at 26. This statement by counsel is unsupported by any statement – sworn or unsworn – in the state or federal record by either LaPorta, Lemcke or Dyer stating such. Rather, federal habeas counsel refers to a declaration by *Alford* – not counsel or the investigator – stating that LaPorta said to him that the case could be negotiated on a plea only to the first degree murder charge and a single life with sentence. There is no statement by *LaPorta* that he would so testify. Indeed, quite to the contrary, LaPorta called this allegation “absolute nonsense” prior to trial. See text, *supra*, at 45.

Motion counsel additionally attached an unsworn report by a detention services officer, R. L. Juliano, stating why he placed Alford on suicide watch on October 23, 1996. In the course of the report, Juliano states that “Alford was afforded the opportunity to negotiate his charges from Life without possibility of parole to Life with the possibility of parole.” #26, Ex. 94, Exhibit E thereto. It is highly questionable that the guard’s cryptic statement, in a report directed to an entirely different concern, was definitively referring to imposition of only one life with sentence on the “charges.” For example, he also refers to “Life without” in the singular in a situation where the starting point of the negotiation would have been two rather than one life without sentences. In any event, Juliano’s statements as to what he thought he heard during trial as to what plea allegedly was offered prior to trial would have been inadmissible hearsay when offered to prove what plea was offered before trial.

That leaves only Alford’s own declaration filed in support of the motion to withdraw plea as the sole non-hearsay testimonial evidence relied upon in support of the motion to establish the alleged offer by the

(continued...)



1 Similarly, Alford was not prejudiced by a failure to present additional affidavits or  
 2 witnesses in support of the motion to withdraw guilty plea. In support of this claim, he  
 3 submitted declarations by his mother, Catherine Moses, by her friend, Sharon Morehouse,  
 4 and by Frederick Alford, Sr., his father. Collectively, these witnesses attested that petitioner  
 5 and/or counsel told them at the time of the trial that the State had made a one life with offer  
 6 prior to trial. The family members and friend further attested as to Alford's state of mind with  
 7 regard to the alleged pretrial and trial offers.<sup>122</sup> Such testimony would have been inadmissible  
 8 hearsay when offered to prove what offer the State in fact had made before trial. The  
 9 subjective state of mind testimony further would have been immaterial given that the prejudice  
 10 inquiry under *Strickland* is an objective one. In all events, however, the core moving premise  
 11 of these witnesses – that the State had made a one life with offer before trial that Alford would  
 12 have accepted the offer if he had only known then about the State's planned use of the letters  
 13 – was belied and refuted by the contemporaneous record reflecting that the State instead had  
 14 offered to accept a plea to first degree murder *with use of a weapon* with *two* life with  
 15 sentences. Alford thus cannot establish prejudice on this aspect of the claim.

16 Ground 1(f) accordingly does not provide a basis for federal habeas relief.<sup>123</sup>

## 17 **Ground 2: Involuntary Plea**

18 In Ground 2, petitioner alleges that his plea was not knowing and voluntary due to  
 19 ineffective assistance of trial counsel as detailed in his Grounds 1(a) through 1(e), which he

---

20  
 21 <sup>121</sup>(...continued)

22 State to negotiate the case for a single life with sentence. Even if Alford had testified live to the same effect,  
 23 such testimony would have been directly belied and refuted by the contemporaneous trial record reflecting the  
 24 status of the plea negotiations. Petitioner thus cannot establish prejudice.

<sup>122</sup>#27, Ex. 116, Petitioner's Exhs. "G", "H" and "I" thereto. See also the discussion in footnote 121,  
 24 *supra*, regarding any possible testimony by Peter LaPorta.

<sup>123</sup>Petitioner's additional allegations in the federal traverse as to being "obviously confused" at the  
 25 time of the plea, #53, at 21, were not contained in the first amended petition and further do not appear to be  
 26 exhausted. Pursuant to Rule 15, petitioner must seek leave of court in a motion to file an amended petition in  
 27 order to expand the pleadings after the State's answer. The represented petitioner has not done so at any  
 28 point during the time that this matter has been pending for decision in this Court. He may not raise new  
 factual allegations challenging the conviction for the first time in the traverse and without first seeking leave to  
 amend the pleadings.



incorporates as if set forth *in extenso*. For the reasons previously assigned with regard to Grounds 1(a) through 1(e), the Court concludes that the Ground 2 does not provide a basis for federal habeas relief except with regard to the subornation of perjury plea, as to which there was no factual basis for the completed crime of subornation of perjury.

***Ground 3: Ineffective Assistance of Appellate Counsel***

In the remaining claims in Ground 3, petitioner alleges that he was denied effective assistance of appellate counsel on the direct appeal from the second judgment of conviction following his plea. In Ground 3(a), he alleges that he was denied effective assistance by appellate counsel's failure to argue that there was an insufficient factual basis for the home invasion plea. Ground 3(b) was dismissed as unexhausted. In Ground 3(c), petitioner alleges that he was denied effective assistance by appellate counsel's failure to challenge the state trial court's denial of the motion to preclude the felony murder theory because the charge was non-specific and violated the Double Jeopardy Clause. In Ground 3(d), petitioner alleges that he was denied effective assistance by appellate counsel's failure to challenge the state trial court's denial of a motion to strike the deadly weapon enhancement on the ground that the knife did not constitute a deadly weapon under Nevada state law.

***Ground 3(a): Failure to Challenge the Factual Basis for the Home Invasion Plea***

On state post-conviction review, petitioner raised a claim in both the state district court and the Supreme Court of Nevada alleging that he was denied effective assistance by appellate counsel's failure to argue that there was an insufficient factual basis for the home invasion plea.<sup>124</sup>

The state district court found that the evidence proffered by the State established a sufficient factual basis for the home invasion plea, and the court therefore concluded that appellate counsel acted with reasonable competence in not raising the issue on appeal.<sup>125</sup>

///

---

<sup>124</sup>#27, Ex. 116, at 15-18; Ex. 129, at 16-18.

<sup>125</sup>#27, Ex. 119, at 5, ¶¶ 9-11.

1 On appeal from the denial of post-conviction relief, however, the Supreme Court of  
2 Nevada addressed only a separate independent substantive claim challenging the factual  
3 basis for the home invasion plea without also addressing petitioner's separate and distinct  
4 ineffective assistance of appellate counsel claim challenging counsel's failure to raise that  
5 issue on the earlier direct appeal. The state high court rejected the independent substantive  
6 claim on the basis that it had been waived by appellate counsel's failure to raise the claim on  
7 direct appeal.<sup>126</sup>

8 This Court will address Ground 3(a) *de novo* because it does not appear that the  
9 Supreme Court of Nevada directly addressed the merits of this exhausted claim as an  
10 ineffective assistance of appellate counsel claim. In reviewing the claim, the Court  
11 incorporates its prior discussion of the related Ground 1(e)(1).<sup>127</sup> Even if the Court assumes,  
12 *arguendo*, that appellate counsel's performance was deficient in failing to raise this issue,  
13 petitioner nonetheless cannot carry his burden of establishing resulting prejudice. First, the  
14 testimony at the first and second trials potentially supported an inference that Alford entered  
15 the front door with sufficient force to damage the door and door jamb to the point that the door  
16 thereafter was capable of being opened without the use of any force. Second, there was  
17 ample evidence tending to establish that Alford used physical force that resulted in damage  
18 to the structure in kicking or busting open the bedroom door, and petitioner has cited no  
19 factually apposite Nevada state authority holding that the act of forcibly busting open the  
20 bedroom door did not constitute either a continuation of the original entry or a forcible entry  
21 into the room itself for purposes of the home invasion statute. He therefore cannot establish  
22 prejudice from the failure to raise the issue on direct appeal.

23 Ground 3(a) therefore does not provide a basis for federal habeas relief.

24 ///

---

26 <sup>126</sup>#27, Ex. 132, at 2 n.3. The court addressed other claims of ineffective assistance of appellate  
27 counsel but did not address this particular ineffective assistance claim.

28 <sup>127</sup>See text and record citations, *supra*, at 55-59.

1           ***Ground 3(c): Failure to Challenge Denial of Pretrial Motion as to Felony Murder***

2           In Ground 3(c), petitioner alleges that he was denied effective assistance by appellate  
3 counsel's failure to challenge the denial of a pretrial motion to preclude the felony murder  
4 theory because the charge was non-specific and violated the Double Jeopardy Clause.

5           This claim is not exhausted to the extent that petitioner alleges that appellate counsel  
6 was ineffective for failing to challenge the denial of the denial of the pretrial motion on the  
7 legal ground that it violated the Double Jeopardy Clause. Petitioner presented no such  
8 reliance on the Double Jeopardy Clause in the state courts, and the allegation that appellate  
9 counsel should have challenged the denial of the motion on double jeopardy grounds appears  
10 for the first time in petitioner's papers in federal court.<sup>128</sup>

11           Respondents, however, have not challenged exhaustion of this aspect of the claim.  
12 As with Ground 1(a), the Court exercises its discretion to proceed to the merits of the  
13 unexhausted claim, given the late stage of these proceedings and the lack of merit of the  
14 claim. *See Granberry, supra*. The Court will apply a *de novo* standard of review to the claim  
15 because the state courts never considered, or were given the opportunity to consider, the  
16 unexhausted claim on the merits.

17           Petitioner can demonstrate neither deficient performance nor resulting prejudice based  
18 on appellate counsel's failure to raise a double jeopardy challenge to the denial of the pretrial  
19 motion.

20           First, as discussed further below with respect to the exhausted portion of Ground 3(c),  
21 the challenge to the pre-plea denial of the pretrial motion was waived by the plea. Appellate  
22 counsel therefore did not render deficient performance in failing to raise the waived issue;  
23 and, further, there is not a reasonable probability that raising the waived issue would have  
24 changed the outcome on the appeal.

25           ///

---

26  
27  
28           <sup>128</sup>#27, Ex. 116, at 17; Ex. 129, at 18. See also text, *supra*, at 29-32 (non-exhaustion of related Ground 1(a)).

1 Second, as discussed above under Ground 1(a), petitioner has failed to establish that  
 2 a double jeopardy challenge would have had a realistic chance of success.<sup>129</sup> Accordingly,  
 3 appellate counsel did not render deficient performance in failing to raise the double jeopardy  
 4 issue nor was there a reasonable probability that raising the issue would have changed the  
 5 outcome on appeal.

6 Petitioner did exhaust the claim in Ground 3(c) that he was denied effective assistance  
 7 by appellate counsel's failure to challenge the denial of a pretrial motion to preclude the felony  
 8 murder theory because the charge was non-specific. The Supreme Court of Nevada rejected  
 9 this claim on the following ground:

10 We also reject Alford's contentions that appellate counsel  
 11 was ineffective for failing to argue the district court erred in  
 12 denying Alford's pretrial motions to strike the deadly weapon  
 13 enhancement . . . and to preclude the felony-murder argument.  
 14 We conclude that appellate counsel had no reasonable likelihood  
 15 of success on the merits of those issues because Alford waived  
 16 his right to raise them on appeal in entering his plea of nolo  
 17 contendere. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d  
 1102, 1113 (1996) ("An attorney's decision not to raise meritless  
 18 issues on appeal is not ineffective assistance of counsel."); Webb  
 19 v. State, 91 Nev. 469, 538 P.2d 164, 165 (1975) (holding that,  
 20 generally, defendant who enters a plea has no right to appeal  
 21 events preceding it in the criminal process).

22 #27, Ex. 132, at 2 n.3.

23 Alford contends that the Nevada Supreme Court's decision rejecting this claim is not  
 24 entitled to AEDPA deferential review because the court failed to provide a rationale for its  
 25 decision. Petitioner acknowledges that the court did in fact provide the rationale quoted  
 26 above. He urges, however, that this waiver language was inapplicable to his case because  
 27 he claimed on direct appeal that his plea was invalid due to ineffective assistance of trial  
 28 counsel and an argument that trial counsel was ineffective for failing to adequately challenge  
 the felony murder theory was part of the ineffective assistance of trial counsel claim.

This argument is wholly meritless. The waiver rule applied by the Supreme Court of  
 Nevada applied directly to the claim at issue – the claim that *appellate* counsel was ineffective

---

<sup>129</sup>See text, *supra*, at 32-33.

1 for failing to challenge the state court's denial of the pre-plea motion seeking to preclude the  
 2 felony murder theory. Any challenge to the pre-plea denial of the motion was waived by the  
 3 plea, and it therefore was not ineffective assistance of appellate counsel to not raise that  
 4 issue on appeal. That is an express rationale for decision explicitly rejecting the ineffective  
 5 assistance of appellate counsel claim. Any claim having to do with ineffective assistance of  
 6 trial counsel had absolutely nothing to do with whether an independent substantive claim on  
 7 the earlier direct appeal challenging the state court's denial of the pretrial motion was waived.  
 8 Petitioner's suggestion to the contrary is wholly without merit.<sup>130</sup>

9 Petitioner provides no additional argument relevant to this claim. The Nevada  
 10 Supreme Court's rejection of the claim was not an objectively unreasonable application of  
 11 *Strickland*.

12 Ground 3(c) therefore does not provide a basis for federal habeas relief.

13 ***Ground 3(d): Failure to Challenge Denial of Pretrial Motion as to Weapon***

14 The final remaining claim, Ground 3(d), is subject to substantially the same analysis  
 15 as the analysis of the exhausted claim under Ground 3(c). In Ground 3(d), petitioner alleges  
 16 that he was denied effective assistance by appellate counsel's failure to challenge the denial  
 17 of a pretrial motion to strike the deadly weapon enhancement. The Supreme Court of  
 18 Nevada, in the portion of its order quoted directly above under Ground 3(c), clearly rejected  
 19 this claim on the ground that "appellate counsel had no reasonable likelihood of success on  
 20 the merits [of the challenge to the pretrial ruling] because Alford waived his right to raise [the  
 21 claim] on appeal in entering his plea of nolo contendere." Petitioner's argument that the  
 22 Nevada Supreme Court nonetheless did not provide an applicable rationale for its decision  
 23 is wholly without merit here as well. Petitioner further argues the merits of the weapon  
 24

---

25 <sup>130</sup>Petitioner further erroneously relies upon *Delgado v. Lewis*, 223 F.3d 976 (9<sup>th</sup> Cir. 2000), as  
 26 holding that a state court rejection of a claim with no stated rationale is not entitled to AEDPA deference.  
 27 *Delgado* instead holds that the federal habeas review is *not de novo* and that the federal court must conduct  
 28 an independent review of the record to determine, *under the AEDPA standard*, whether the rejection of the  
 claim was an unreasonable application of clearly established federal law. 223 F.3d at 982. *Delgado* in all  
 events has no application to the present case because the Supreme Court of Nevada clearly stated its  
 directly applicable rationale for rejecting the claim of ineffective assistance of appellate counsel.

1 enhancement issue, but he provides no principled and relevant argument in any way  
2 undermining the Nevada Supreme Court's conclusion that an appellate challenge to the pre-  
3 plea ruling was waived by the plea. The state high court's rejection of the claim of ineffective  
4 assistance of appellate counsel was not an objectively unreasonable application of *Strickland*.

5 Ground 3(d) therefore does not provide a basis for federal habeas relief.

6 IT THEREFORE IS ORDERED that, on the merits of the claims remaining before the  
7 Court, the petition for a writ of habeas corpus shall be GRANTED IN PART and DENIED IN  
8 PART, such that the writ is unconditionally GRANTED IN PART to the extent that the  
9 conviction and sentence imposed for Subornation of Perjury under Count III in the judgment  
10 of conviction filed on April 21, 1997, in *State of Nevada v. Frederick Edson Alford, Jr.*, Case  
11 No. C104872, in the District Court for Clark County, Nevada, hereby is VACATED IN PART,  
12 as to the conviction and sentence on the subornation charge only, and petitioner shall be  
13 released unconditionally from any and all actual or constructive custody under said conviction  
14 and sentence on the subornation charge only, including all collateral consequences  
15 therefrom. The writ is DENIED IN PART in that all other claims in this action that remain  
16 before the Court for a decision on the merits to set aside the convictions and sentences for  
17 first degree murder and home invasion shall be DISMISSED with prejudice. The convictions  
18 and sentences for first degree murder and home invasion under the April 21, 1997, judgment  
19 of conviction remain in full force and effect and are not affected by this Court's order and  
20 judgment.

21 The Clerk of Court shall enter final judgment accordingly.

22 DATED: September 14, 2006

23  
24 

25  
26 \_\_\_\_\_  
KENT J. DAWSON  
United States District Judge  
27  
28